

COMMITTEE ACTION SHEET

COUNCIL DOCKET OF

march 11, 2008☐ Supplemental ☐ Adoption ☐ Consent ☒ Unanimous Consent Rules Committee Consultant Review

R -

O -

South Bay Fuel Cell Power Purchase Agreement

☒ Reviewed ☐ Initiated By NR&C On 2/27/08 Item No. 3e

RECOMMENDATION TO:

Approve.

VOTED YEA: Frye, Faulconer, Peters, Atkins

VOTED NAY:

NOT PRESENT:

CITY CLERK: Please reference the following reports on the City Council Docket:

REPORT TO THE CITY COUNCIL NO.


INDEPENDENT BUDGET ANALYST NO.

COUNCIL COMMITTEE CONSULTANT ANALYSIS NO.

OTHER:

Metropolitan Wastewater Department's Executive Summary Sheet dated February 4, 2008; Metropolitan Wastewater Department's February 27, 2008, PowerPoint

COUNCIL COMMITTEE CONSULTANT



000173

DATE REPORT ISSUED:

February 4, 2008

REPORT

NO. NR&C FEB 27 2008 #3e

ATTENTION:

Council President and City Council

ORIGINATING
DEPARTMENT:

Metropolitan Wastewater Department

SUBJECT:

Renewable Energy Fuel Cell Power Purchase Agreement with Linde Merchant Production, Inc.

COUNCIL DISTRICT(S):

8

STAFF CONTACT:

Thomas R. Alsbaugh, Senior Mechanical Engineer (858) 654-4493

REQUESTED ACTION:

Authorizing the Mayor, or his designee, to enter into the Power Purchase Agreement for Renewable Biogas Fueled On-Site Power Cogeneration By and Between the City of San Diego and Linde Merchant Production, Inc. and to enter into the associated Flat Rate Lease for approximately 19,450 square feet of land area at the South Bay Water Reclamation Plant (SBWRP).

STAFF RECOMMENDATION:

Adopt the Ordinance

EXECUTIVE SUMMARY:

0001 On September 17, 2007, the City of San Diego entered into the Agreement for the Purchase and Sale of Biogas with BOC Merchant Production, Inc. to sell approximately 1.3 million cubic feet per day of digester gas from the Point Loma Wastewater Treatment Plant (PLWTP). BOC Merchant Production, Inc. has since changed their name to Linde Merchant Production, Inc. (Linde). Linde is in the process of designing and building a facility on a leased site at the PLWTP to clean and compress this excess digester gas, now being flared, and load it on to compressed gas transport trucks for shipment to three 1.2MW fuel cells at host sites including the University of California, San Diego. Linde will pay MWWD approximately \$250,000 per year for this renewable fuel. This agreement for the sale of the PLWTP biogas also gave the City the rights to negotiate with Linde for one of these 1.2MW molten carbonate fuel cells.

MWWD has negotiated a Power Purchase Agreement for one of these three fuel cells to produce 1.2MW of renewable baseload electricity for, and at, its South Bay Water Reclamation Plant (SBWRP). The Linde owned 1.2MW Fuel Cell Energy brand fuel cell and compressed gas unloading station will be designed, permitted, installed, owned, operated, and financed by Linde. The compressed gas trucks will make two round trips per day from the PLWTP to the SBWRP to provide digester gas fuel to this ultra clean, 47% efficient fuel cell whose by products are biogenic carbon dioxide and water. This fuel cell will reduce green house gas emissions by over 2,500 tons per year and will add 1.2 MW of renewable energy to the City's goal to install 50MW of renewable electricity generation by 2013.

The PLWTP Agreement to sell the gas to Linde and the SBWRP's Power Purchase Agreement are completely separate agreements.

The SBWRP is expected to save approximately \$75,000/yr on electricity, that it will avoid purchasing from SDG&E, for a total expected savings of \$750,000 over the initial 10-year term of the agreement. The renewable electricity cost from Linde will be 10.6 cents/kwh with no electrical demand charges and no escalation in cost for the first 5 years of the agreement. The agreement includes the option for extensions of 1 to 10 years, if both parties agree.

Additionally, under certain circumstances, potential revenues from the sale of carbon credits or greenhouse gas credits will be shared with the City.

This project is time sensitive because it is driven by first come, first serve, California Self-Generation Program grants, as well as Federal renewable energy tax credits that are set to expire on January 1, 2009. The South Bay Fuel Cell is expected to be operational in December 2008.

Equal Opportunity Contracting Program (EOCP)

Funding Agency: City of San Diego

Goals: 15% Voluntary (MBE/WBE/DBE/DVBE/OBE)

Subcontractor Participation: Construction contractors will be selected after Linde completes the design and permitting of the installation and EOC outreach for contractors is complete. City staff will monitor achievement of goals prior to issuing a Notice to Proceed with Construction, which is a defined term in the Agreements.

Other: A Work Force Report of the San Marcos office has been submitted. The Work Force Report reflects fewer than 15 employees and is, therefore, exempt from employment category goals.

FISCAL CONSIDERATIONS:

This renewable energy fuel cell installation will be owned, financed, and operated by Linde Merchant Production, Inc. The Power Purchase Agreement is expected to save the SBWRP approximately \$75,000 per year in electrical energy costs for a total of \$750,000 over the 10-year term of the agreement. This action also includes an agreement to lease Linde the South Bay Water Reclamation Plant Fuel Cell Sites, approximately 19,450 square feet of land area, in consideration for the energy savings.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

This item will be reviewed by the Natural Resources and Culture Committee on February 27, 2008. The Agreement for the Purchase and Sale of Biogas with BOC Merchant Production, Inc, for the sale of digester gas from the PLWTP, authorized by Council on September 4, 2007.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

This item will be reviewed by the Natural Resources and Culture Committee on February 27, 2008. This item was approved by the San Ysidro Planning and Development Group on January 15, 2008, and by the Metro Commission Technical Advisory Committee on January 16, 2008.

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable):

Rate Payers

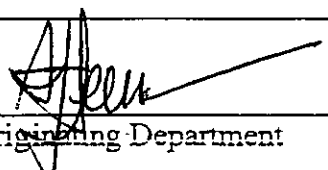
California Center for Sustainable Energy (CCSE)

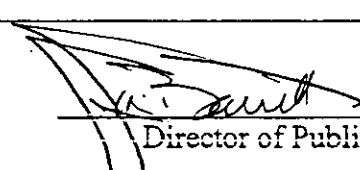
Linde Merchant Production Inc.

SDG&E

Public Utilities Commission

Projected impacts: Two round trips of gas trucks per day to the SBWRP from the PLWTP, controlled energy costs, reduced power plant emissions, reduced need for additional electrical utility infrastructure.


Originating Department


Director of Public Utilities

000176

DOCKET SUPPORTING INFORMATION
CITY OF SAN DIEGO

DATE:

EQUAL OPPORTUNITY CONTRACTING PROGRAM EVALUATION

February 14, 2008

SUBJECT: Renewable Energy Fuel Cell Power Purchase Agreement

GENERAL CONTRACT INFORMATION

Recommended Contractor: Linde Merchant Production, Inc.

Amount of this Action: \$750,000 – Projected Energy Savings over 10 years

SUBCONTRACTOR PARTICIPATION

There is no subconsultant activity associated with this action.

EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE

Equal Opportunity Required.

Linde Inc. submitted a Work Force Report for their San Diego County employees dated February 12, 2008. The Work Force Report reflects fewer than 15 employees and is, therefore, exempt for employment category goals.

ADDITIONAL COMMENTSThe *Work Force Analysis* is attached.

Construction contractors will be selected after Linde completes the design and permitting of the installation and EOC outreach of contractors is complete.

This action will authorize entering into a Power Purchase Agreement for Renewable Biogas Fueled Onsite Power Cogeneration by and between the City of San Diego and Linde Merchant Production, Inc.

JLR

File: Admin WOFO 2000

Date WOFO Submitted: 2/12/2008

Input by: jlr

Goals reflect statistical labor force availability for the following: 2000 CLFA
San Diego, CA

City of San Diego/Equal Opportunity Contracting

WORK FORCE ANALYSIS REPORT

FOR

Company: Linde II

I. TOTAL WORK FORCE:

	CLFA Goals		Black		Hispanic		Asian		American Indian		Filipino		White		Other	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Mgmt & Financial	4.0%	0	0	0	12.0%	0	0	0	0.5%	0	0	0	1	0	0	0
Professional	6.6%	0	0	0	14.8%	0	0	0	0.4%	0	0	0	0	0	0	0
A&E, Science, Computer	9.9%	0	0	0	19.5%	0	0	0	0.6%	0	0	0	0	0	0	0
Technical	7.0%	0	0	0	20.8%	0	0	0	0.6%	0	0	0	0	0	0	0
Sales	4.5%	0	0	0	25.8%	0	0	0	0.7%	0	0	0	0	0	0	0
Administrative Support	8.1%	0	0	0	32.1%	0	0	0	0.5%	0	0	0	0	0	0	0
Services	4.4%	0	0	0	54.0%	0	0	0	0.5%	0	0	0	0	0	0	0
Crafts																
Operative Workers																
Transportation																
Laborers																
TOTAL	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0

HOW TO READ TOTAL WORK FORCE SECTION:

The information blocks in Section 1 (Total Work Force) identify the absolute number of the firm's employees. Each employee is listed in their respective ethnic/gender and employment category. The percentages listed under the heading of "CLFA Goals" are the County Labor Force Availability goals for each employment and ethnic/gender category.

Mgmt & Financial
Professional
A&E, Science, Computer
Technical
Sales
Administrative Support
Services
Crafts
Operative Workers
Transportation
Laborers

TOTAL

TOTAL EMPLOYEES			Female Goals
ALL	M	F	
1	1	0	59.5%
0	0	0	49.0%
0	0	0	73.2%
0	0	0	8.6%
0	0	0	15.2%
1	1	0	

HOW TO READ EMPLOYMENT ANALYSIS SECTION:

The percentages listed in the goals column are calculated by multiplying the CLFA goals by the number of employees in that job category. The number in that column represents the percentage of each protected group that should be employed by the firm to meet the CLFA goal. A negative number will be shown in the discrepancy column for each underrepresented goal of at least 1.00 position.

II. EMPLOYMENT ANALYSIS

This firm has fewer than 15 employees and is, therefore, exempt from the employment category goals.

Pursuant to The California Environmental Quality Act (CEQA) and State CEQA Guidelines

To: Development Services Department, Environmental Analysis Section (EAS)
 From: Metropolitan Wastewater Department (MWWD), Engineering and Program Management Division
 Subject: Request for Determination of Environmental Exemption

Similar to forms 1472, 1544 and PA700, this form is being routed to your section in request for concurrence that the below-referenced project is exempt from the CEQA. If EAS concurs that the project is exempt, please check the appropriate boxes, sign this form and return it via fax to Dirk Smith at MWWD, (858) 292-6310. If the project is not exempt or there are any questions about the project description, please call Dirk Smith at (858) 614-5722. Thank you.

Agency: CITY OF SAN DIEGO

LDR NO.:

DATE: 2/5/2008

Action/Permit(s): CITY COUNCIL APPROVAL

Permit No.: N/A

Description of Activity: South Bay Water Reclamation Plant Fuel Cell. Authorizing the Mayor, or his designee, to enter into a Power Purchase Agreement between the City of San Diego and Linde Merchant Production Inc. for an initial term of 10 years, and enter into the South Bay Water Reclamation Plant Fuel Cell Site Lease for approximately 19,450 square feet of land area at the Metropolitan Wastewater Department's (MWWD) South Bay Water Reclamation Plant. This action also includes approval for Linde Merchant Production Inc. to construct fuel cell modules and exhaust stack, electrical motor control, inverter, a water purification module along with other support system skids on concrete pads at the fuel cell site. A truck unloading station will also be constructed to park three compressed gas tube trailers.

Location of Activity: The project is located within the South Bay Water Reclamation Plant located at 2411 Dairy Mart Road in the Tijuana River Valley Community Planning Area, San Diego, CA.

1. ☒ This activity (Entering into two Agreements) is EXEMPT FROM CEQA pursuant to:

☐ Section 15061(b)(1) of the State CEQA Guidelines (the activity is not a project as defined in Section 15378).

☒ Section 15060(c)(3) of the State CEQA Guidelines ("Not a Project").

2. ☒ This project is EXEMPT FROM CEQA pursuant to State CEQA Guidelines Section checked below:

ARTICLE 19 of GUIDELINES CATEGORICAL EXEMPTIONS (Incomplete list)		ARTICLE 18 of GUIDELINES STATUTORY EXEMPTIONS (Incomplete list)	
Sec.	Short Name	Sec.	Short Name
<input checked="" type="checkbox"/> 15301 1	Existing Facilities	<input type="checkbox"/> 15261	Ongoing Project
<input type="checkbox"/> 15302 2	Replacement or Reconstruction	<input type="checkbox"/> 15262	Feasibility and Planning Studies
<input checked="" type="checkbox"/> 15303 (b)	New Construction or Conversion of Small Structures	<input type="checkbox"/> 15265	Adoption of Coastal Plans and Programs
<input type="checkbox"/> 15304 (h)	Minor Alterations to Land	<input type="checkbox"/> 15268	Ministerial Projects
<input type="checkbox"/> 15305 5	Minor Alterations in Land Use Limitations	<input type="checkbox"/> 15269	Emergency Projects
<input type="checkbox"/> 15306 6	Information Collection	<input type="checkbox"/> Other	
<input type="checkbox"/> 15311 11	Accessory Structures		
<input type="checkbox"/> 15312 12	Surplus Government Property Sales		
<input type="checkbox"/> 15315 15	Minor Land Divisions		
<input type="checkbox"/> 15317 17	Open Space Contracts or Easements		
<input type="checkbox"/> 15319 19	Annexation of Existing Facilities and Lots for Exempt Facilities		
<input type="checkbox"/> 15332 32	In-Fill Development Projects		
<input type="checkbox"/> Other			

It is hereby certified that the City of San Diego has determined the above activity to be exempt.

Distribution: EAS File
 Dirk Smith, MWWD/EPM
 Tom Alsbaugh, MWWD/EPM

Myra H. Human
 Environmental Analysis Section

2/19/08
 Date

000179

LINDE / CITY

POWER PURCHASE AGREEMENT

FOR RENEWABLE BIOGAS FUELED ON-SITE POWER COGENERATION

Dated as of March 25, 2008

By and Between

The City of San Diego
BUYER

and

Linde Merchant Production, Inc.
SELLER

LINDE / CITY

This Power Purchase Agreement ("Agreement" or "PPA") is made and entered into as of March 25, 2008, by and between the City of San Diego, California, USA, a municipal corporation with offices located at 9192 Topaz Way, San Diego, CA 92123 (hereinafter referred to as "BUYER") and Linde Merchant Production Inc., formerly known as BOC Merchant Production Inc., a Delaware corporation, with offices located at 575 Mountain Avenue, Murray Hill, New Jersey 07974 USA (hereinafter referred to as "SELLER");

1. Recitals/Introduction

1.1 SELLER and BUYER are parties to a non-binding Letter of Intent dated as of December 21, 2007 ("LOI") for the supply and purchase of Electricity and Thermal Energy generated from fuel cells using alternative and renewable biogas fuel.

1.2 In this regard, SELLER and its affiliated companies, have been selected and are under contract with the City of San Diego's Metropolitan Wastewater Department to develop and operate a waste digester gas purification system at the City's Point Loma site which will supply approximately 0.8 MMSCF/day of purified biogas from sewage waste digester gas that would otherwise have been flared or released into the atmosphere. (Point Loma Agreement) The purified biogas can be used as an alternative and renewable fuel to power fuel cells to generate Electricity and Thermal Energy.

1.3 The BUYER has a need for power at its facility, the South Bay Water Reclamation Plant (SBWRP) located at 2411 Dairy Mart Road, San Diego, Ca 92154 ("Facility") and desires to permit SELLER to install, own, operate, and maintain a fuel cell energy system to provide BUYER with an alternative renewable power supply.

1.4 This Agreement sets forth the definitive and binding terms and conditions under which SELLER agrees to install, own, operate, and maintain a fuel cell energy system at the BUYER Facility, and the BUYER agrees to purchase Electricity and possibly utilize the Thermal Energy generated by the fuel cell energy system.

1.5 The consideration for BUYER's terms, as provided herein are: 1) installation of the Energy System by SELLER and the provision of Energy to the Facility as provided in this Agreement, 2) other considerations as provided under the terms of the Point Loma Agreement which allow SELLER to make such Energy System available to BUYER, 3) the mutual promises herein contained and; 4) other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged.

2. Definition of Terms & Interpretation

2.1 **Definitions.** For purposes of this Agreement, the following terms shall have the meaning as defined below:

2.1.1 **Affiliate:** Any person, firm, corporation or other legal entity that controls, is controlled by or is under common control with such person.

2.1.2 **Agreement:** This document and its exhibits referenced herein, which are made a part hereof, as amended from time to time by mutual written consent by BUYER and SELLER.

2.1.3 **BUYER:** Shall have the meaning set forth in the introductory paragraph hereof.

2.1.4 **California ISO:** Refers to the California Independent System Operator Corporation or its successor organization.

2.1.5 **Change of Law:** Shall have the meaning set forth in Section 27.

- 2.1.6 Commissioning Date: The date SELLER determines the Energy System is operational and the purchase and sale of Electricity begins.
- 2.1.7 Confidential Information: Shall have the meaning as set forth in Section 35.
- 2.1.8 Construction Commencement Deadline: Shall have the meaning set forth in Section 14.5.
- 2.1.9 Construction Notice to Proceed: shall have the meaning set forth in Section 14.4.4
- 2.1.10 BUYER Utility(ies): Public or private providers of utility services to the Facility other than SELLER.
- 2.1.11 Dispute: Means any dispute or claim for unresolved issues arising out of or relating to this Agreement.
- 2.1.12 Electrical Interconnection Point: The physical point where the Energy System connects to the existing electrical systems serving the Facility and as described in the Energy System Description.
- 2.1.13 Electricity: Electrical energy not including steam or hot water.
- 2.1.14 Electricity Purchase Price: That price set forth in the pricing sheet attached to this Agreement as Exhibit A, as adjusted in year six and each year thereafter, of this agreement by the annual CPI or PPI escalation index included therein.
- 2.1.15 Energy: Shall mean electrical and thermal energy.
- 2.1.16 Energy System: The system for the production of Energy and related devices and infrastructure that SELLER shall install, own, operate, and maintain at the Facility pursuant to this Agreement.
- 2.1.17 Energy System Site: The portion or portions of the Facility site occupied by the Energy System as defined in the South Bay Fuel Cell Site Lease ("Energy System Site Lease").
- 2.1.18 Energy System Description: A description of the Energy System, including, at a minimum, a description of the proposed technology for electricity generation; projected kilowatt hours of electricity to be generated on a daily basis; projected BTU's per hour of waste heat available to be recovered on a daily basis, and fuel storage and delivery system as set forth in Exhibit B and B1.
- 2.1.19 Environmental Liabilities: All claims, damages, losses, costs and expenses arising from conditions on, at or under the Seller's Plant Site or from noncompliance with applicable environmental laws and regulations.
- 2.1.20 Excused Outage: Shall have the meaning set forth in Section 11.2.3.
- 2.1.21 Facility: South Bay Water Reclamation Plant
- 2.1.22 Force Majeure: Shall have the meaning as set forth in Section 23.
- 2.1.23 Good Utility Practice: Any of the practices, methods and acts engaged in or approved by the majority of the electric utility industry and the independent power industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision is made, could have been expected to accomplish the desired result at a reasonable cost consistent with

good business practices, reliability, safety, and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather is intended to include acceptable practices, methods, or acts generally accepted in the region.

- 2.1.24 Government Authorities: The United States of America, the State of California, the County of San Diego, and any political subdivision thereof and any agency, department, commission, board, court, or instrumentality thereof.
- 2.1.25 Hazardous Material or Hazardous Waste: Shall have the meaning for the PPA as set forth in Section 32.1.
- 2.1.26 Operational Memorandum of Understanding ("MOU"): A document, to be developed and agreed to by the Parties at some date following the execution of this Agreement, which will be used to define operational issues, define invoicing formats, interpret contract clauses and develop any other contractually required documentation, all of which will be updated periodically by the Parties.
- 2.1.27 Material Safety Data Sheets: Shall have the meaning set forth in Section 32.1.
- 2.1.28 Minimum Power Charge: The minimum monthly charge payable by BUYER to SELLER hereunder with respect to Product as more specifically described in Section 2 of Exhibit A, subject to adjustment as hereinafter provided.
- 2.1.29 Notice: Notice to the other Party as set forth in Section 20.
- 2.1.30 Notice to Proceed: A notice issued by the BUYER to SELLER to proceed with the planning, design and permitting of the Energy System.
- 2.1.31 Notice of Completion: "Notice of Completion" or "NOC" shall mean the date the Buyer certifies in writing that the SELLER has met the performance and testing requirements as described in the PPA necessary to begin permanent commercial operations at 1.2 MW, plus or minus 3 percent, at ISO conditions and as adjusted for fuel energy content of the purified biogas when raw biogas supply is below 600 BTU's per standard cubic foot (high heating value).
- 2.1.33 Party/Parties: BUYER and SELLER are each referred to as "Party" and collectively as the "Parties".
- 2.1.33 Point Loma Biogas Source: The primary source of fuel for the Energy System, which comes off the Point Loma Wastewater Treatment Plant as raw biogas and is processed into suitable fuel for the Energy System by the SELLER.
- 2.1.34 Point(s) of Delivery: For Electricity, the Electrical Interconnection Point; and for Thermal Energy, the Thermal Interconnection Point, which will be further detailed on the design drawings.
- 2.1.35 Product: Electricity and/or Thermal Energy.
- 2.1.36 Project Design: Shall have the meaning in Section 14.
- 2.1.37 Project Schedule: The schedule for permitting, construction and commissioning of the Energy System attached at Exhibit C, subject to delays due to Force Majeure.
- 2.1.38 SELLER: Linde Merchant Production Inc.

- 2.1.39 SELLER's Meter: Metering equipment as may be necessary to measure the quantity of Electricity delivered under this Agreement.
- 2.1.40 SELLER Property: Shall have the meaning in Section 19.
- 2.1.41 Supply Period: The Initial Term, as it may be extended as provided herein.
- 2.1.42 Thermal Energy: Hot flue gases produced by the Energy System.
- 2.1.43 Thermal Interconnection Point: The physical point where the Energy System connects to the Facility heat exchange piping system for the delivery of Thermal Energy and as described in the Energy System Description, and to be located on the Energy System Site.

2.2 Rules of Interpretation. In this Agreement, unless the context indicates otherwise: (i) the singular includes the plural and the plural the singular; (ii) references to statutes are to be construed as including all statutory or regulatory provisions consolidating, amending, replacing, succeeding or supplementing the statute referred to; (iii) references to "writing" include printing, typing, lithography, facsimile reproduction and other means of reproducing words in a tangible visible form; (iv) the words "including", "includes" and "include" shall be deemed to be followed by the words "without limitation" or "but not limited to" or words of similar import; (v) references to Sections and Exhibits are to those of this Agreement unless otherwise indicated; (vi) references to this Agreement shall be deemed to include all exhibits attached hereto and all subsequent amendments and other modifications hereto; (vii) references to other agreements, instruments or documents shall be deemed to include all amendments and other modifications thereto, but only to the extent such amendments or other modifications are permitted by the terms of this Agreement; (viii) references to laws shall be deemed to include all amendments, modifications and supplements thereto; and (ix) references to a Party include their respective successors and permitted assigns. The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (a) where the Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed, and (b) wherever the Agreement gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.

3. Power Purchase.

3.1 Beginning on the Commissioning Date and until the expiration of this Agreement or its earlier termination, SELLER shall sell to BUYER, and BUYER will purchase from SELLER, BUYER's present and future requirements up to and including the first 1.2 MW. of SBWRP electrical load for Energy for BUYER's operations now or hereafter conducted at BUYER's Facility, including, without limitation, any additional or different requirements arising as a result of acquisitions, divestitures or other extraordinary transactions, located at the Facility, all in accordance with the terms and conditions set forth herein.

3.2 In the event that BUYER moves its operations from the Facility during the Term, BUYER shall reimburse SELLER for all reasonable costs incurred by SELLER in moving the Energy System or building a new energy system to provide Energy at the new location. Under the latter circumstance, BUYER shall reimburse SELLER for any costs incurred by SELLER in removing the Energy System and remediating the Energy System Site, notwithstanding anything to the contrary in this Agreement. SELLER shall remain responsible, however, in the event of such circumstances for removal and remediation of the new location pursuant to Section 23 hereto. BUYER shall supply a suitable location for the Energy System at the new location and shall assure that SELLER has a right to supply Energy to BUYER at the new location without interfering with or affecting any existing obligations of BUYER to third parties at the new location, including obligations of BUYER to other suppliers. BUYER shall indemnify SELLER from any liability or loss arising out of any claim by a third party that, as result of moving to supply BUYER at the new location, SELLER has interfered with or affected a third party's rights and/or caused it to suffer damages or loss.

3.3 SELLER shall not be obligated to supply Energy from the Energy System that exceeds the capacity for the system as set forth in Exhibit B or to the extent the Energy System cannot produce the required Energy for any reason, including the fault or neglect of SELLER.

3.4 BUYER agrees that all Energy purchased under this Agreement is for BUYER's sole use and will not be resold to any third-party.

3.5 SELLER shall not be obligated to supply Energy if the BUYER's requirements are less than eighty percent (80%) of the capacity of the Energy System. Whenever possible, BUYER shall provide SELLER with two (2) business days' Notice if its requirements will be less than eighty percent (80%) of the capacity of the Energy System. Under such circumstances when BUYER's requirements are less than eighty percent (80%), SELLER has the right, in its sole discretion and as permitted by law, to sell any Electricity from the Energy System into the market operated by the California ISO for SELLER's sole benefit. If BUYER fails to purchase on average at least eighty (80%) of the maximum kilowatt hour output of Electricity as described in the Energy System Description for five (5) or more consecutive days and the BUYER's failure to purchase Electricity is not a result of the SELLER's failure to make Electricity available to the BUYER for purchase, the Supply Period shall be automatically extended for the same number of full days, but BUYER shall not be excused from paying to SELLER the Minimum Power Charge provided for in this Agreement. Such number of full days shall be determined by dividing twenty-four into the number of hours during which any such failure to deliver continued and disregarding any fractional remainder.

3.6 BUYER shall accept Energy from SELLER as the primary energy source for the Facility subject to the conditions set forth elsewhere in this Agreement. BUYER shall accept and purchase Electricity delivered by SELLER from the Energy System prior to accepting or producing any Energy from any other source and shall use or purchase Energy from any such other source only to the extent that SELLER cannot or does not supply BUYER's needs for Energy from the Energy System. BUYER shall purchase its requirements for Energy supplied by SELLER up to the available output of the Energy System, subject to the conditions set forth herein.

3.7 SELLER shall retain the ownership and economic benefits including right to sell or hold of any incentive funds, grants and/or subsidies relating to the Energy System, including, but not limited to, California Self-Generation Incentive Plan grant moneys. This also includes any environmental benefits relating to the environmental attributes of Energy production by the Energy System, including, but not limited to, any renewable energy certificates, green tags, environmental credits and/or emissions credits ("Environmental Benefits"). Any value received by SELLER from Environmental Benefits above the equivalent of \$250,000 per year for each year in which the credits were generated shall be shared with BUYER with 75% going to the SELLER and 25% to the BUYER. SELLER shall be responsible for securing such incentive funding, grants, subsidies and/or Environmental Benefits, including the costs related thereto.

4. Electricity Metering & Measurement

4.1 SELLER shall install and maintain such SELLER's utility grade Meter as may be necessary to measure the quantity of Electricity supplied under this Agreement. SELLER shall provide BUYER continual access to the meter and will provide either electric monitoring of the meter or timely access to the data.

4.2 SELLER shall deliver Electricity to BUYER at the Electrical Interconnection Point. BUYER shall pay SELLER for all Electricity delivered to the Electrical Interconnection Point at the Electricity Purchase Price as measured by SELLER's Meter. No Electricity utilized by the Energy System as station load or related pumps or equipment necessary to operate the Energy System shall be accounted for by SELLER's Meter, which shall record only Electricity delivered to the Electrical Interconnection Point. Any other meters required to meter Energy System station load shall be the SELLER's responsibility.

LINDE / CITY

4.3 SELLER shall, prior to the Commissioning Date, and annually thereafter, test all the meters and provide copies of the reports and/or results of such tests to BUYER. Such tests shall be conducted by independent third parties qualified to conduct such tests. BUYER shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If SELLER's Meter is inaccurate by more than two percent (2%), it shall be promptly repaired or replaced, and any billings based on such SELLER's Meter shall be adjusted to offset such inaccuracy with respect to only Electricity metered during the thirty (30) day period prior to such test, or during the latter half of the period of time since the meter was last tested, whichever is shorter.

4.4 In addition, SELLER's Meter shall also be inspected and tested for accuracy at such other times as BUYER may reasonably request, but in no event more than once every six (6) month period. BUYER shall bear the cost of all such tests, except those requested by BUYER that show the SELLER's Meter was inaccurate by more than two percent (2%).

4.5 If for any reason the SELLER's Meter is out of service or out of repair so that the amount of Electricity cannot be ascertained or computed from the reading thereof, the amount of Electricity shall be estimated and agreed upon by the Parties hereto on the basis of the best data available.

5. Invoicing & Payment

5.1 For each month of the Supply Period, SELLER shall invoice BUYER and BUYER shall pay SELLER for Energy supplied by the SELLER in accordance with the Electricity Purchase Price for Electricity supplied as measured by SELLER's Meter.

5.2 Approximately every thirty (30) days or once per month, SELLER shall submit an invoice to BUYER setting forth the charges and the amounts due SELLER for Energy supplied to BUYER in the period prior to the invoice and any other sums due. SELLER shall deliver invoices to BUYER by post to: Teresa DiPrima, Principal Engineering Aide Metropolitan Wastewater Department, 9192 Topaz Way, San Diego, CA 92123 or electronic mail to: tdiprima@sandiego.gov. The invoice shall include sufficient details so that BUYER can reasonably confirm the accuracy of the invoice including, among other details, beginning and ending meter readings. BUYER shall pay the invoice within thirty (30) days of receipt. Amounts not paid when due shall accrue late fees and interest equal to the lesser of one percent (1%) per month compounded daily or the highest lawful rate.

5.3 If BUYER in good faith disputes an invoice, BUYER shall (i) pay the undisputed portion of the invoice, including but not limited to the Minimum Power Charge; and (ii) provide SELLER with a Notice specifying in detail the disputed amount and the basis for the dispute. The SELLER and BUYER shall use reasonable diligence to resolve the disputed amounts within sixty (60) days from SELLER's receipt of BUYER's Notice. Upon resolution of any such dispute between the Parties, except as otherwise agreed by the Parties as part of the resolution of the relevant dispute, any previously unpaid and due amount will be promptly paid by BUYER with accrued interest equal to the lesser of (i) one percent (1%) per month compounded daily, or (ii) the highest lawful rate, from the original due date.

5.4 Timely payment by BUYER of all amounts due and owing to SELLER hereunder shall be an express condition to the continued performance by SELLER of its obligations hereunder. In the event, however, BUYER fails to make any payment within 30 days of its respective due date, SELLER shall have the right to suspend the performance of its obligations under this Agreement, including, without limitation, the delivery of Energy, provided SELLER shall have given BUYER seven (7) days' Notice of SELLER's intention to exercise its right to suspend the delivery of Energy. SELLER shall have the right to continue such suspension until such time as BUYER has paid SELLER all outstanding amounts due, including applicable interest. BUYER's obligation to pay Minimum Power Charge shall continue during any such suspension. The Supply Period shall be extended, at SELLER's option, for the same number of full days for which the delinquent payment was outstanding, and BUYER shall pay for Energy at the prices then in effect during such extension.

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5.5 Annual Reconciliation meeting: Within 60 days after the end of each contract year, the BUYER and SELLER will meet to review invoices, escalation adjustments, adjust utility prices, and reconcile outstanding invoices, credits or other business issues including updating the operating MOU.

6. **Thermal Energy**

6.1 Upon request by BUYER, SELLER shall supply available Thermal Energy from the Energy System to BUYER under the following terms.

6.2 SELLER shall deliver Thermal Energy to the Thermal Interconnection Point.

6.3 BUYER shall own and be responsible for the supply, installation, operations, and maintenance of any equipment and/or systems necessary to recover and use Thermal Energy from the Thermal Interconnection Point, including, but not limited to, the heat exchanger and heat transfer fluids.

6.4 Title to and risk of loss for all Thermal Energy produced from the Energy System shall at all times remain with the BUYER.

7. **Product Specifications; Testing**

7.1 SELLER warrants to BUYER that, at the time of delivery at the Point of Delivery, Product sold and delivered to BUYER under this Agreement shall conform to the specifications set forth in Exhibit B and shall be delivered free of liens and other similar encumbrances. BUYER's receipt of Product delivered hereunder shall be deemed an acceptance thereof and a waiver by BUYER of any and all claims with respect to the quality of such Product unless BUYER gives SELLER Notice of claim within thirty (30) days after receipt of such Product.

7.2 THE WARRANTY SET FORTH IN SECTION 7.1 IS IN LIEU OF ALL OTHER WARRANTIES, REPRESENTATIONS OR CONDITIONS OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, IN FACT OR BY LAW, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

8. **Delivery, Responsibility and Risk of Loss**

8.1 Except as otherwise provided, risk of loss and title for the Product shall pass to BUYER at the Point of Delivery.

8.2 BUYER assumes all risk and shall be solely liable and responsible for Product at and from the Point of Delivery. BUYER has the responsibility to comply with all applicable federal, state or local law, rule or regulation regarding the presence, handling or use of Product at and from its delivery at the Point of Delivery. SELLER shall comply with all applicable federal, state or local law, rule or regulation relating to the production and distribution of the Product before the Point of Delivery.

9. **Facility to be Used**

SELLER shall construct and operate the Energy System entirely upon the grounds of the Facility as provided in the Energy System Site Lease. SELLER shall rely on no other property, public or private, upon which to construct, operate or maintain the Energy System.

10. **Section Reserved**

11. **Term and Termination**

11.1 The Agreement shall take effect on the date first written above and shall remain in full force and effect for an initial term ending at the end of the month following the tenth (10th) anniversary of the Commissioning Date, subject to the requirements of Section 3.5, Section 16 and Section 34.2. The Parties may by written agreement extend this Agreement for one, five or ten years. In addition, and

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unless extended by written agreement, this Agreement shall automatically renew and continue in effect for subsequent one year periods after the end of the then-current term unless terminated by either Party on not less than twelve (12) months' written Notice prior to the end of the then-current term. The Agreement shall also terminate when any of the following occurs:

11.1.1 As provided elsewhere in this Agreement.

11.1.2 By mutual agreement of the parties.

11.2 In addition to the rights to terminate under other provisions of this Agreement, BUYER may terminate this Agreement at any time on ninety (90) days' Notice to SELLER, without further liability except as provided herein, if:

11.2.1 The Facility is destroyed or so damaged by a Force Majeure event that the Facility is not used by BUYER. Then, upon Notice from BUYER to SELLER, this Agreement shall terminate and BUYER shall have no liability to SELLER. SELLER shall remove its Energy System, in accordance with Section 23.1, within ninety (90) days after Notice of termination by the BUYER without further liability to BUYER. In the event the Facility is partially damaged, and such damage did not result in BUYER's election to terminate or discontinue use of the Facility under the terms set forth herein, and subject to Section 34 then this Agreement shall continue in effect, subject to the termination rights provided herein.

11.2.2 Delivery of Energy does not occur within 18 months of the satisfaction of all of the conditions set forth in Section 14.4, provided however, that if SELLER has demonstrated that it has applied for all required permits, has taken required actions to achieve timely approval for such permits, has ordered all of the major Energy System components and has begun construction or if a Force Majeure event has occurred, the one-year deadline shall be extended on a day to day basis as required to complete the Energy System so long as SELLER continues to make a diligent effort to complete the Energy System.

11.2.3 If the SELLER fails to operate the Energy System for a continuous period of sixty (60) days. The BUYER shall have the right to demand an explanation of any continuous periods of non-operation in excess of thirty (30) days in order to assess the nature and cause of the failure to operate. For purposes of this paragraph, the Energy System shall be deemed to have been operated during any period of Excused Outage. An "Excused Outage" shall mean any interruption in the operation of the Energy System which is the result of (i) a request by the BUYER that SELLER suspend production of Energy; (ii) an event or occurrence of Force Majeure; or (iii) compliance with any limits on the operation of the Energy System contained in any license, permit or other authorization applicable to the Energy System.

11.3 In addition to the rights to terminate under other provisions of this Agreement, SELLER may terminate this Agreement at any time on thirty (30) days' Notice to BUYER, without further liability except as provided herein, if:

11.3.1 SELLER determines that the Energy System's construction and/or operation would not be economically viable for the SELLER; provided however that (i). SELLER agrees to substantiate their determination in writing to BUYER, and agrees to have BUYER's representative review substantiation in detail, and (ii) If this clause is exercised by the SELLER after the NTP, the SELLER will pay the BUYER \$25,000 for inconvenience costs experienced by BUYER during the development of the project.

11.3.2 SELLER is unable, after diligent efforts, to obtain or maintain required approvals from Government Authorities and the City of San Diego permitting authorities for the installation and operation of the Energy System and notifies BUYER.

11.3.3 The conditions for commencement of construction of the Energy System as set forth in Section 14.4 have not occurred within eighteen months but no earlier than six months after this Agreement is effective, provided that the non-occurring of such conditions is not caused solely by SELLER.

11.3.4 BUYER fails to purchase on average at least eighty (80%) of the maximum kilowatt hour output of Electricity as described in the Energy System Description over any continuous period of sixty (60) days, provided however that the BUYER's failure to purchase Electricity is not a result of the SELLER's failure to make Electricity available to the BUYER for purchase.

12. Assignment of Agreement

12.1 This Agreement is not assignable by either SELLER or BUYER except with the written consent of the other party; provided, however, that such consent shall not be unreasonably withheld or delayed; and provided further, that upon written notice (1) either party may assign this Agreement, without the consent of the other party, to a party acquiring all or substantially all of its business or operations with respect to which this Agreement relates or (2) SELLER may assign this Agreement or any of its rights hereunder to any affiliate. No such sale, assignment or other transfer of any rights of a party hereunder shall be effective unless the purchaser, assignee or transferee assumes such party's obligations under this Agreement.

12.2 Intent to Assign. This Agreement involves improvement to property owned by the BUYER (Metropolitan Wastewater Department), said property being a component of the Metropolitan Sewerage System owned and operated by the BUYER. Present ownership notwithstanding, the State of California established a new public agency, the SAN DIEGO AREA WASTEWATER MANAGEMENT DISTRICT ("DISTRICT"), which is intended to take and assume from the BUYER the rights, title, and interest in the Metropolitan Sewerage System, and to accept and honor all duties with respect to same, including the rights and responsibility described in this Agreement. Therefore the SELLER is hereby notified, and by execution of this Agreement expressly agrees, that upon the condition that the DISTRICT is established, and upon written notice to the SELLER the BUYER shall have the unilateral right to assign all its rights and delegate all its duties under this Agreement to the DISTRICT, which in such event, will immediately assume the role of BUYER and shall thereafter bear all of the BUYER's rights and responsibilities under this Agreement, and the City of San Diego ("CITY") shall then be fully and forever discharged from same. Such right to assignment shall be effective for any and all claims which may be made by the SELLER, whether such claims be made before or after the date of assignment. Nothing in this provision shall be construed to impose upon the BUYER a duty to assign this Agreement if the DISTRICT is established; such assignment may be made at the CITY's sole discretion.

13. Reports to BUYER

13.1 In addition to any other reports required to be provided to the BUYER under this Agreement including the Material Safety Data Sheets required under Section 32.1 hereof, SELLER shall provide the BUYER with copies of any annual reports provided to any lenders who may be assisting the SELLER in financing the Energy System or to the owner of the Energy System (including affiliates of SELLER if such are the owner or lender) regarding the Energy System's operations within fifteen (15) days of providing such reports to lenders or owner.

13.2 In the event of any major unscheduled outage or series of unscheduled outages, SELLER shall, within five (5) business days, provide BUYER a written explanation of the cause of such outage and the action SELLER has undertaken or plans to undertake to remedy the problem, and the estimated time when service shall be restored.

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13.3 During the term of this Agreement, commencing with the approval of the CNTF and ending with the Commissioning Date of the Energy System, SELLER shall provide the BUYER's project engineer with bi-weekly status updates.

13.4 SELLER shall provide all documents relating to the Sale of Environmental Benefits upon execution of a related translations in a timely basis.

14. Design and Construction of Improvements

14.1 SELLER has provided to BUYER the Energy System Description provided in Exhibit B and B1. Project Design shall conform to all descriptions in Exhibits B, B1 and D and will not vary from the Energy System Description without written consent from BUYER, which shall not be unreasonably withheld. Non-substantive equipment substitutions are permitted.

14.1.1 Partnering and Project Coordination and Status meetings: Partnering and project Kickoff meetings will be arranged prior to the design, construction and operational phases of this project. At these meetings, the BUYER's and SELLER's personnel and contractors directly involved the next phase of the project will meet for a 3 hour partnering meeting and a 2 hour kickoff meeting. During the design and the operational phase, the BUYER and SELLER will have monthly Project Coordination and Status meetings. During the construction phase, these meetings will occur weekly. Schedules will be updated at these meetings and at construction meetings detailed four (4) week look ahead schedules will be provided

14.2 SELLER shall submit a 30% complete and fully complete set of Project Design plans within thirty (30) and one hundred and twenty (120) days of the Effective Date of this Agreement, respectively. Such plans shall include the parameters of the Energy to be provided, which shall include the voltage, KW, power factor for electricity and temperature, pressure, flow and BTU's or tons/hours of the Thermal Energy to be made available. The 30% complete and fully complete set Project Design plans will include items as listed and indicated in Exhibit D. All structures or utilities that are installed outside the SELLER's Energy System Site Lease shall meet the Clean Water Program Guidelines electronic drawing standards. The Energy System's facilities will follow the Architectural and Art theme of the SBWRP. All exposed surfaces and materials installed out side the Energy System Site Lease will match the existing Facility's look and quality, and will follow the Architectural and Art theme of the SBWRP. All designs for connections to the Facility's systems shall meet the BUYER's Clean Water Program Guidelines.

14.3 SELLER shall cause the Energy System to be designed and constructed in accordance with the California Building Code, the laws of all Governmental Authorities, including the City of San Diego, with jurisdiction including CALARP and CALOSHA and pursuant to the final approved Project Design. The Energy System and any improvements to the Facility shall be reviewed and approved by all Governmental Authorities that have jurisdiction by law, including the City of San Diego permitting authorities, and where such reviews and approvals are conducted by BUYER, such approvals shall not be unreasonably withheld, delayed or conditioned.

14.4 No construction work shall occur until:

14.4.1 BUYER has reviewed and approved SELLER's Project Design and SELLER is issued a building permit; and SELLER has provided BUYER Copy of Building permits(s) and any other required permits or approvals.

14.4.2 SELLER shall have procured and, if required, paid for all code compliance reviews, interconnection agreements, permits and authorizations and governmental subdivisions, if any, having jurisdiction over the construction of the Energy System. All permits, interconnection agreements, authorizations, reviews and any environmental documentation, including any Air Pollution Control District permits, obtained in connection with this Agreement and the use of the Energy System shall be obtained at SELLER's sole cost and expense; and copies shall be provided to the BUYER

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14.4.3 SELLER has secured all insurance coverages required in Section 28; and, has provided BUYER with Safety and Emergency Plan as described in Exhibit E, a draft operating Memorandum of Understanding (MOU) and any other documentation required by this PPA or the Energy System Site Lease prior to the Commencement of Construction.

14.4.4 Upon satisfaction of Sections 14.4.1 through 14.4.3, BUYER shall provide SELLER a written construction notice to proceed ("Construction Notice to Proceed" - CNTP).

14.5 SELLER shall commence construction of the Energy System no sooner than ten (10) days after the effective date of this Agreement, and no later than the Construction Commencement Deadline, which shall be one hundred and twenty (120) days after the satisfaction of all of the conditions set forth in Section 14.4. The construction of the Energy System shall be completed in accordance with the Project Schedule and in no event later than one year after the Construction Commencement Deadline.

14.6 BUYER and SELLER understand that SELLER may not be able to complete the permitting process until it has completed the Project Design.

14.7 Notwithstanding the BUYER's approval of the project, in no event shall such approval be interpreted as making the BUYER responsible for, and SELLER acknowledges that the BUYER is not responsible for, the design or construction of the Energy System. SELLER is responsible for making safe, fully operable and appropriate connections to the Facility's systems.

14.8 SELLER shall at its sole cost and expense design, build, own, maintain and operate the Energy System in compliance with the Project Design plans, Project Schedule, and Safety Plan consistent with Good Utility Practice. SELLER shall at its sole cost and expense (i) perform all repairs (whether routine or emergency) on the Energy System; and (ii) provide, or arrange for the provision of, all labor, material, and other supplies for the Energy System. The SELLER is responsible for the security of the SELLER'S property and materials. BUYER will provide the SELLER with a material lay down area and a parking area during the construction period.

14.8.1 SELLER's construction personnel shall receive BUYER's one (1) hour safety orientation prior to their commencement of work at the Facility.

14.9 All material shall conform to the Project Design. Materials used for connections to any SBWRP system, building or road shall comply with the Clean Water Program Guidelines up to and including any connection isolation valve, system isolation breaker or expansion joint, etc.

14.10 In no event may SELLER conduct construction in a manner inconsistent with Good Utility Practice that will unreasonably interfere with or reduce the delivery of Energy to the Facility without the BUYER's prior consent. Such may result in overtime hours for SELLER, and any extra expenses incurred by SELLER or its subcontractor(s) shall be borne by SELLER. SELLER agrees to provide not less than fourteen (14) days' Notice prior to making connections to the Facility that might affect Facility operations.

14.11 SELLER shall promptly provide Notice to BUYER of any problems or delays SELLER is encountering in obtaining any required governmental approvals or permits or construction delays and, upon approval of the Project Design, BUYER shall work in good faith to assist SELLER in securing any and all required approvals and/or permits.

14.12 At least fifteen (15) days in advance of the startup for testing, SELLER shall notify the BUYER of the date for initial startup testing. Start up testing will include regular digester gas truck movements, regular start up and shut down, emergency shut down testing and fuel switching to and from natural gas and back to digester gas. These test will demonstrate that the they can be done without significant impact to the SBWRP and with no effect to the SBWRP electrical system. These tests are to be performed in a manor that demonstrates that they can reliably be accomplished with out interruption to the SBWRP's SDG&E electrical supply. Such notification shall include a certification that the Energy System is ready for operation for testing purposes, that the Energy System has been constructed in accordance with the

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Project Design, and that all permits and operational approvals have been obtained (except those depending on operation), and an Energy System start up procedure is to be approved by BUYER. The BUYER will either approve or provide SELLER comments on the start up procedure within seven (7) days of it receipt form the SELLER. BUYER's approval shall not be unreasonable withheld.

14.13 At least fifteen (15) days in advance of the expected Commissioning Date and after startup testing, SELLER shall provide emergency system shut-down and any other Energy System related training for BUYER employees and will provide the final emergency shut-down manual as required by Section 15.5.

14.14 SELLER shall design all modifications/additions to the Facility in such a manner that they may be disconnected and removed at the end of the term of this Agreement without interference with, or damage to, the Facility or other BUYER property.

14.15 Within sixty (60) days of the Commissioning Date of the Energy System, SELLER shall provide to BUYER three (3) copies of all "as built" plans, SELLER shall also provide a single electronic copy of the 'as built' plans to the BUYER.

The SELLER shall provide the BUYER a written notice that the project is complete and request a final inspection of the project's completion by the BUYER. The BUYER shall provide the SELLER with a final inspection within 15 days or receipt of request. If the BUYER does not find the installation of the project or the documentation for the project to be complete and final as defined in this PPA and the Energy System Site Lease, then the BUYER will generate a punch list of items to be completed with in 15 days of the inspection and the SELLER can request an other inspection. Once the project is determined to be complete, a NOC will be issued by the BUYER.

15. Operation of Energy System

15.1 SELLER shall be responsible for all aspects of the management and operation of the Energy System. SELLER shall use Good Utility Practice in all aspects of the management and operation of the Energy System. SELLER shall retain sole control and absolute discretion over the Energy System at all times and the amount of Energy delivered to BUYER. SELLER shall provide BUYER a annual schedule of planned outages. SELLER shall notify BUYER of SELLER's planned operating schedule for each calendar month at least five (5) days prior to the start of such month. SELLER shall provide reasonable notice to BUYER of any subsequent changes to the operating schedule. SELLER shall have the right from time to time to shut down any part of the Energy System for such period of time as may be necessary for repairs and maintenance consistent with Good Utility Practice. SELLER shall provide reasonable notice to BUYER prior to any planned shutdown for maintenance and repairs based on then-existing circumstances.

15.2 SELLER shall operate the Energy System so as to not unreasonably disrupt the operation of the BUYER Facility. For purposes of efficient cooperation, the parties in good faith will enter into and revised from time to time, as needed, an operational Memorandum of Understanding (MOU).

15.3 If as a result of SELLER's planned operating schedule BUYER acquires or commits to acquire Energy (including standby commitments) during the hours that SELLER indicated that SELLER would not be delivering Energy to the BUYER, BUYER shall have no obligation to accept Energy from the Energy System during such hours. The preceding sentence shall not apply if SELLER agrees in writing to reimburse the BUYER for any and all costs the BUYER incurred as a result of arranging for electricity supply due to SELLER's planned period of non-operation.

15.4 On and after the Commissioning Date, SELLER shall cause the Energy System to be operated and maintained at SELLER's sole cost and consistent with Good Utility Practice, including the cost of capital repairs and replacements, in a commercially reasonable manner throughout the term of this Agreement.

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15.5 Sixty (60) days prior to commencement of operations, SELLER shall prepare and submit a detailed emergency shut-down procedures manual for the Energy System. SELLER shall update such manual whenever those procedures change. Prior to commencement of operations, upon any changes to procedures, and at least annually thereafter, SELLER shall train the BUYER's Facility personnel in such procedures and any other SBFC items the SBWRP personnel will need to be aware of. If SELLER requests BUYER's building personnel to shutdown the Energy System and BUYER timely complies with the request or the BUYER follows the manual regarding emergency shutdown, then the BUYER shall not be responsible to SELLER for any damages or costs to the Energy System attributable to an emergency shutdown.

15.6 SELLER will arrange for and provide for an annual inspection by BUYER of the Energy System Site, Energy System and connections to the SBWRP. Inspections are to insure the Energy System and Energy System Site are being maintained in a proper and safe manner and in compliance with the PPA, the Energy System Site Lease and the MOU.

16. BUYER Maintenance

BUYER shall at all times during the term of this Agreement use commercially reasonable efforts to maintain the Facility in good condition and repair so as to be able to receive and utilize electricity and/or thermal energy from the BUYER Utilities. BUYER shall maintain in good working order and available at all times, its connection and service contract(s) with the relevant utilities or any successors thereto, so that BUYER can, upon any suspension or interruption of the Energy System, provide the Facility with the full requirements for Energy. If the BUYER Facility shall cease to operate as a result of a malfunction or other shutdown, BUYER shall use commercially reasonable efforts to remedy such interruption as soon as possible. All obligations of the BUYER in this Agreement regarding maintenance shall be subject to the right of the BUYER during periods of renovation of any Facility to no longer accept or be obligated to pay for Energy and to issue a shut down order to the Energy System; provided however, during such periods, SELLER has the right, in its sole discretion and as permitted by law, to sell any Electricity from the Energy System into the market operated by the California ISO for SELLER's sole benefit; and provided further that the Supply Period shall be extended, at SELLER's option, for the same number of full days of the renovation and BUYER shall pay for Energy at prices then in effect during such extension.

17. Utilities/Expenses

17.1 All reasonable costs associated with bringing required utilities from the point of origin to the point of connection at the Energy System, including, without limitation, related professional and service charges, meters, and the costs of connections including any hook-up fees assessed by any utility company, water district, and/or government agency, shall be paid by SELLER.

17.2 During the term hereof, BUYER shall at its sole cost and expense maintain the SBWRP's water, sewer, fire, telephone, distributed control systems, first aid & other emergency services, roads, water supply, optional fuel cell heat recovery system, and other facility ancillary services (other than natural gas supply, electrical system, water system, and other ancillary services that are applicable to the Energy System).

17.3 During the term of this Agreement, unless otherwise specified in this PPA, SELLER shall, at its sole cost and expense, arrange to supply and deliver all digester gas and natural gas to the extent such digester gas and natural gas is available and in an amount sufficient for the Energy System to operate in the manner required under this Agreement. The Parties understand that if electricity is purchased by BUYER under this Agreement as described in Exhibit A, Table A-2, BUYER will be solely responsible for the cost of the natural gas to be used to fuel the Energy System.

17.4 SELLER shall use reasonable commercial methods to maximize the use of digester gas produced by the Point Loma Biogas Source before using any natural gas.

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17.5 The BUYER will sell the SELLER water per the arrangement provided for in the Energy System Site Lease.

18. No Responsibility of BUYER

18.1 Except for the payments for Energy pursuant to Section 5 hereof and provision of services under Section 17 hereof, the BUYER will be under no obligation nor have liability of any kind or character for the payment of labor, materials, or otherwise in connection with the design, construction, operation, repair, or maintenance of the Energy System or for any contracts or subcontracts in connection therewith. SELLER shall be responsible for all such matters.

18.2 The construction contract(s) shall specifically provide that the contractor(s) agrees to indemnify, defend and hold BUYER harmless from and against any claims arising out of the negligent performance of work of SELLER(s), its agents, subcontractors or employees relating to the Energy System authorized under this Agreement, except to the extent that any such claims are the result of the negligence or willful misconduct of the BUYER, its agents or employees. Such obligations shall include, but not be limited to, personal injury, employee injury, property, and third party damage claims.

18.3 BUYER agrees to cooperate with SELLER and, if necessary, provide consents and execute with the local distribution utility such agreements as are necessary to permit the interconnection of the Energy System.

18.4 The construction contract(s) shall provide for payment bonds in the aggregate amount of \$1 million from a California surety to protect the interests of labor, material, and equipment supplies, or alternatively, SELLER may provide BUYER an irrevocable letter of credit in equivalent amount for this purpose. This security shall be released by BUYER thirty (30) days after Notice of Completion provided all claims are released.

19. Ownership of Improvements

Subject to the rights provided to BUYER pursuant to other terms hereof, the Energy System and all alterations, additions, improvements or installations made thereto by SELLER and all SELLER property used in connection with the installation, operation and maintenance of the Energy System is, and shall remain, the personal property of SELLER ("SELLER Property"). In no event shall any SELLER Property be deemed to be a fixture, nor shall BUYER, nor anyone claiming by, through, or under BUYER have any rights in or to the SELLER Property at any time except as otherwise provided herein.

20. Notices

20.1 Any notice or other communication required or permitted to be given pursuant to this Agreement shall be in writing and shall be deemed to have been duly given if delivered personally or sent by telex, telecopy, facsimile transmission (confirmed by certified mail) or by certified mail (postage prepaid, return receipt requested), addressed as provided below. Until another address or addresses shall be furnished in writing by either Party, notices shall be given in duplicate, addressed as follows:

if to SELLER

LINDE Merchant Production Inc.
575 Mountain Avenue
Murray Hill, NJ 07974
Facsimile Number (908) 771-4803
Attention: Mr. Steven Eckhardt

and a copy also sent to:

The LINDE Group, Inc.
575 Mountain Avenue
Murray Hill, NJ 07974
Facsimile Number (908) 771-4803

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Attention: General Counsel

if to BUYER:

Assistant Director
Metropolitan Wastewater Dept.
9192 Topaz Way
San Diego, CA 92123

and a copy also sent to:

Tom Alspaugh
Metropolitan Wastewater Dept
9192 Topaz Way
San Diego, CA 92123

20.2 Notice of change of address or telefacsimile number shall be given by written notice in the manner described in this section.

21. Taxes

21.1 BUYER shall be responsible for and pay all federal, state and local taxes, however denominated (except taxes on SELLER's net income or for its general privilege to conduct business in any State), arising in connection with the production, sale or delivery of any Product hereunder.

22. Default

22.1 The occurrence of any of the following shall be an Event of Default:

- 22.1.1 The failure of either Party to perform or comply with any material term of this Agreement within thirty (30) days after Notice by either Party or, if such default cannot be cured within such time period, the defaulting Party shall have commenced the cure and shall and thereafter to diligently pursue such cure, provided however that such period shall not be extended beyond an additional sixty (60) days; or,
- 22.1.2 Unreasonable interference by SELLER with the operations of BUYER that is curable by suspension of operation of the Energy System but is not cured by such suspension within twenty-four (24) hours of Notice of the occurrence from the BUYER; or,
- 22.1.3 Failure of SELLER to obtain and maintain all necessary permits and operation by SELLER in violation of any laws, ordinances, rules, regulations, orders or permits of a public authority having jurisdiction that remains uncured after seven (7) days' Notice from BUYER or from the agency with jurisdiction without Notice from BUYER, unless the SELLER is acting with due diligence to abate the violation and submits to the BUYER a plan or course of action, subject to BUYER's approval, and SELLER is acting within the time schedule of that plan or course of action; or,
- 22.1.4 Failure of SELLER to advise BUYER of the loss of a permit within seven (7) days after the SELLER receives actual knowledge of such loss; or,
- 22.1.5 Any failure by a Party to make any payment required to be made by that Party hereunder, except disputed payments made in good faith for cause shown, when such failure continues for a period of ten (10) days after Notice by the non-defaulting Party; or,

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- 22.1.6 Should either Party at any time after the execution of this Agreement file a voluntary petition in bankruptcy or be adjudged bankrupt either upon the voluntary petition or petition of creditors which is not dismissed within ninety (90) days of its being filed, or should either Party seek, claim, or apply for any right, privilege, remedy, relief or protection afforded by any statute or statutes of the United States relating to bankruptcy, or should it make an assignment for the benefit of its creditors, or should a receiver be appointed over, or should an attachment be levied and permitted to remain for a period of more than ninety (90) days following the levying of such attachment upon or against any right, privilege to this Agreement, then, and upon the happening of either of said events, all interest, rights and privileges as shall have been therefore validly assigned by the defaulting Party pursuant to the terms, covenants, and conditions of this Agreement, shall, at the sole option of the non-defaulting Party, cease, terminate, and end upon thirty (30) days' Notice to defaulting Party from the non-defaulting Party after any applicable time periods contained herein; provided, however, if said receiver be discharged within thirty (30) days after said receiver's appointment, the defaulting Party may, at any time within ten (10) days thereafter, notify the non-defaulting Party thereof and resume the performance of this Agreement, and this Agreement shall thereupon again become in full force and effect.

22.2 Remedies in the Event of Default:

- 22.2.1 If SELLER is in default, BUYER may, at BUYER's election, terminate this Agreement by giving SELLER Notice of termination. On the giving of such Notice, all of SELLER's rights to operate the Energy System and every part thereof shall terminate. BUYER shall not be deemed to have terminated this Agreement unless BUYER shall have so declared in writing to SELLER, nor shall BUYER be deemed to have accepted or consented to an abandonment by SELLER by performing acts intended to maintain or preserve the Energy System or appointing a receiver to protect BUYER's interest under the Agreement. Termination under this paragraph shall not relieve either Party from the payment of any sum then due to the other Party or from any claim for damages previously accrued or then accruing against SELLER. Upon any termination of this Agreement, SELLER shall execute such documents as BUYER may request to memorialize the termination and to release BUYER from the terms and conditions of this Agreement.
- 22.2.2 If SELLER is in default then BUYER's election, if permitted under the terms of this Agreement, to perform any obligation of SELLER under any provision of this Agreement, on SELLER's failure or refusal to do so, shall not constitute a waiver of any right or remedy for SELLER's default and SELLER shall promptly reimburse, defend and indemnify BUYER against all liability, loss, cost and expense arising therefrom.
- 22.2.3 If BUYER is in default, SELLER may, at SELLER's election, terminate this Agreement by giving BUYER Notice of termination. On the giving of such Notice, all of BUYER's rights to receive Energy from the Energy System shall terminate. SELLER shall not be deemed to have terminated this Agreement unless SELLER shall have so declared in writing to BUYER. Termination under this paragraph shall not relieve either Party from the payment of any sum then due to the other Party or from any claim for damages previously accrued or then accruing against BUYER. Upon any termination of this Agreement, BUYER shall execute such documents as SELLER may request to memorialize the termination and to release SELLER from the terms and conditions of this Agreement and permit SELLER to remove the Energy System, the cost and expense of which shall be borne by the BUYER if BUYER is in default under this Agreement and SELLER terminates the Agreement.

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- 22.2.4 Upon the occurrence of a default, the non-defaulting Party shall have the right, in addition to the above, to pursue all remedies available at law or in equity, including specific performance.

23. FORCE MAJEURE

- 23.1 Force Majeure. Other than in respect of a payment of money due, neither party shall have any liability to the other for failure to perform its obligations, delay, or loss occasioned by any circumstance, event or occurrence beyond the reasonable control of the affected party ("Force Majeure"). Force Majeure events may include any event or circumstance arising or occurring beyond the reasonable control of Seller or Buyer, which prevent it from performing its obligations under this Agreement including without limiting the generality of the foregoing: (1) any acts of God, including, but without restricting the generality thereof, lightning, earthquakes, storms, epidemics, landslides, floods, fires, explosions or washouts; (2) any strikes, lockouts or other industrial disturbances; (3) any acts of the enemies of the state, sabotage, wars, blockades, insurrections, riots, civil disturbances, arrests or restraints; (4) any freezing, explosions, craterings, breakage of equipment, forced maintenance shutdown or inability to obtain materials or equipment which by the exercise of due diligence, such party could not have prevented or is unable to overcome; (5) any orders of any court or Government Authority, including the City of San Diego, which physically limit the production or transportation of or alter the specifications of Gas or Product, respectively; or (6) any acts or omissions (including failure to take Product) of a transporter or carrier of Product, which are caused by any event or occurrence of the nature described in this Article.

24. UCC and Warranty

Except as otherwise provided in this Agreement, the provisions of the Uniform Commercial Code ("UCC") of the State of California shall be deemed to apply to the Energy transferred hereunder shall be deemed to be "goods" for purposes of the UCC.

25. Section Reserved

26. Compliance with Government Regulations

26.1 Subject to SELLER's right to contest, SELLER shall, at its sole cost and expense, at all times during the Agreement, conform to, and cause all persons using or occupying any part of the Facility to comply with, all applicable laws from time to time applicable thereto arising out of SELLER's use of the premises. SELLER shall comply with all applicable laws relating to the environment, including but not limited to the California Environmental Quality Act (when and to the extent legally applicable) and all seismic, fire, health, and safety ordinances. SELLER covenants and agrees to indemnify and save BUYER harmless from any penalties, damages, or charges imposed for any violation of all laws applicable to the construction of the Energy System and to the use and occupancy of the Energy System Site whether occasioned by neglect, omission, or willful act of SELLER or by any person by license or invitation of SELLER or holding or occupying the same or any part thereof under or by right of SELLER.

26.2 Any environmental assessments and reports shall be coordinated with the designated representatives of BUYER so as to permit continuous review of the assessments and report process.

26.3 It shall be the responsibility of SELLER to take all necessary actions to satisfy any regulatory requirements that may be imposed on BUYER or SELLER by any statute, rule or regulation concerning the sale of Energy to BUYER. BUYER shall cooperate with SELLER and provide information or such other assistance, without cost to SELLER, as may be reasonably necessary for SELLER to satisfy regulatory requirements relating specifically and only to the sale of Energy from the Energy System to BUYER. SELLER shall cooperate with BUYER and provide information or such other assistance, without cost to BUYER, as may be reasonably necessary for BUYER to satisfy regulatory requirements relating specifically and only to the purchase of Energy from the Energy System. SELLER shall deliver to BUYER upon request, and at SELLER's expense, copies of documents and such other evidence as are normally and customarily issued by Governmental Authorities, including the City of San Diego, to demonstrate proof of compliance with all applicable laws pertaining to permits and authorizations relating to the Energy System.

26.4 BUYER will reasonably cooperate with SELLER in filing zoning or rezoning applications, environmental impact reports, or any other governmental or quasi-governmental applications, studies, or declarations as may be required by any applicable laws in regard to construction of the Energy System or for obtaining permits, licenses, or approvals to conduct activities in the Facility. Said cooperation shall include prompt execution of such documents by a duly authorized officer of BUYER. BUYER may, and, if required by applicable laws, shall, join in the application for any permits and authorizations. No zoning changes or variances may be obtained except with BUYER's prior written consent, such consent shall not be unreasonably withheld, delayed or conditioned.

26.5 Parties agree to provide, at no cost to the other Party, all necessary forms, data and other information reasonably requested of a Party by any governmental or regulatory agency or authority having jurisdiction over the Energy System.

27. Change of Law

27.1 If (i) FERC, or any state or state regulatory commission, implements a change in any law, regulation, rule or practice, (ii) California Independent System Operator, upon approval of the FERC, implements a change in any regulation, rule or practice or (iii) a Governmental Authority, including the City of San Diego, having jurisdiction over the Energy System Site or this Agreement implements a change in any law, regulation, rule or practice (any such implementation, a "Change of Law"), that materially affects or will materially affect SELLER's ability to perform under this Agreement, including a Change of Law that imposes penalties or obligations on SELLER that are materially burdensome, the Parties shall negotiate in good faith to determine the amendments, if any, to this Agreement necessary to conform the terms of this Agreement to such change and to maintain the economic bargain initially struck in this Agreement.

27.2 In the event that the Parties are unable to agree on the necessity or substance of any amendment under Section 27.1 within thirty (30) days, then the Parties agree to submit the issue in accordance with Section 36 herein.

27.3 Pending the resolution of the effects, if any, of a Change of Law as set forth in Sections 27.1 and 27.2, if SELLER is rendered wholly or partially unable to perform its obligations under this Agreement because of a Change of Law, the SELLER shall be excused from whatever performance is affected by the Change of Law to the extent so affected.

28. Section Reserved

29. Ownership of Documents

SELLER shall own all documents, computer programs, plans, renderings, charts, designs, drafts, surveys and other intellectual property that are developed by SELLER pursuant to the Agreement. BUYER will

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take such steps as are necessary to protect the rights of the SELLER in such property. BUYER shall maintain all such documents, computer programs, plans, renderings, charts, designs, drafts, surveys and other intellectual property in strict confidence to the extent such confidence is not in conflict with the California Public Records Act (Government Code Section 6250 et seq.) or other applicable statutes or regulations.

30. SELLER Non-Discrimination

SELLER shall perform all work pursuant to this Agreement in compliance with Federal and California law and regulations, prohibiting unlawful discrimination in employment practices.

31. Conflicts of Interest

SELLER warrants by execution of this Agreement unless otherwise disclosed, that no person or selling agent has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for commission, percentage, brokerage or contingent fee, and that SELLER maintains no agreement, employment, or position that would be in conflict with the duties to be performed for BUYER under this Agreement. SELLER further agrees that during the term of this Agreement, SELLER will not obtain, engage in, or undertake any interests, obligations or duty that would be in conflict with, or interfere with, the services or duties to be performed under the provisions of this Agreement.

32. Hazardous Substances

32.1 Except for SELLER's use of materials required for the operation of the Energy System (which materials and amounts of materials will be disclosed to BUYER in written Material Safety Data Sheets setting forth the general hazards and safety information relating to the materials required for operation), SELLER represents and warrants that it will not create, store, use or dispose of any toxic or hazardous materials (including but not limited to those hazardous or toxic substances set forth in Civil Code Section 2782.6(d)), hereinafter "Hazardous Material or Hazardous Waste", at the Facility. SELLER shall notify the BUYER of the types and quantities of any Hazardous Materials or toxic substances that SELLER uses for the operation of the Energy System. The SELLER agrees to comply with all applicable federal, state and local laws and regulations pertaining to hazardous materials' use, storage and disposal at or on the Energy System Site. The SELLER shall indemnify and hold harmless the BUYER and its officers, officials, employees and/or agents and representatives for any violation of hazardous materials law caused by the introduction, production, or generation of Hazardous Materials by the SELLER or SELLER's representatives or for SELLER's use of Hazardous Materials in the operation of the Energy System. Furthermore, SELLER shall reimburse the BUYER for any and all costs related to investigation, clean up, settlement amounts, administrative oversight costs, and/or fines incurred by the BUYER for environmental regulation non-compliance by the SELLER or SELLER's agents and/or representatives. This indemnity shall not apply to the extent that the harm was caused by the negligence or willful misconduct of the BUYER or any indemnitee.

32.2 If SELLER or SELLER's representative generates any regulated hazardous wastes on the BUYER's property, SELLER agrees to handle, store, transport and dispose of such wastes in accordance with all applicable federal, state and local laws and regulations, including all applicable reporting requirements. Upon request of BUYER, copies of all hazardous waste manifests or disposal certificates shall be submitted to the BUYER.

32.3 Storage of hazardous waste shall comply with 22 CCR 66264 et al., all applicable fire regulations, and all other applicable state, federal or local laws and regulations. The SELLER shall not apply to become a "permitted" hazardous waste storage facility at the Facility.

32.4 SELLER shall use best efforts not to spill any hazardous material on or about the Facility. In the event SELLER shall learn of any such spillage, SELLER shall immediately pursue clean-up of the premises and notify the BUYER of such spillage.

32.5 The BUYER reserves the right to inspect all areas that are used by SELLER, for the purpose of verifying environmental compliance.

33. Liability, Insurance and Indemnification

33.1 Consequential and Direct Damages

In no event shall either party be liable to the other for any indirect, incidental, special or consequential damages, including, but not limited to, lost profits, loss of use or business interruptions, under any circumstances, caused by or arising out of, in whole or in part, any negligent act or omission, even if advised of the possibility of such damages, unless and except as may be expressly set forth below:

33.1.1 Fines imposed on a party and that are caused by the other party's breach of this Agreement or its negligence.

A party's direct damages may include, but is not necessarily limited to, its internal or contracted direct labor, equipment, and material costs reasonably and necessarily incurred to overcome or mitigate the other party's breach or negligence.

33.2 Indemnity.

33.2.1 To the fullest extent permitted by law (including, without limitation, California Civil Code Section 2782.8), SELLER shall defend (with legal counsel reasonably acceptable to BUYER), indemnify and hold harmless BUYER and its officers, agents, departments, officials, representatives and employees from and against all claims, losses, costs, damages, injuries (including, without limitation, injury to or death of an employee of a party or its subcontractors), expense and liability of every kind, nature and description (including, without limitation, court costs, attorney's fees, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, and to the extent caused by, the negligence, recklessness, or willful misconduct of SELLER, its subcontractors, anyone directly or indirectly employed by them, or anyone that they control, provided however, that upon completion of defense by SELLER of actions or claims against BUYER, its agents, officers, employees, or representatives, SELLER shall have no duty to indemnify BUYER, its agents, officers, employees, or representatives for costs, damages, injuries (including, without limitation, injury to or death of an employee of a party or its subcontractors), expense and liability of every kind arising from the established comparative negligence of BUYER, its agents, officers, or employees or representatives.

33.2.2 The provisions of this Section 33.2 are not limited by the provisions of Section 33.3 SELLER's Insurance.

33.2.3 Each party agrees to pay any and all costs the other party incurs enforcing the indemnity and defense provisions set forth in Section 33.1.1.

33.3 SELLER's Insurance

33.3.1 Policies and Procedures - SELLER shall, at it or its subcontractor's sole cost and expense, procure insurance against claims for loss including injuries to persons or damage to property, which may arise out of or in connection, with the performance hereunder by the SELLER, SELLER's agents, representatives, officers, employees. SELLER agrees to require any subcontractors retained for the performance of this Agreement to maintain all required insurance under this section, or such type and limit of coverage that may be commercially reasonable for the type and scope of work to be

performed by such subcontractor. SELLER shall maintain this insurance for the duration of this Agreement. SELLER liabilities, including but not limited to SELLER's indemnity obligations, under this Contract shall not be deemed limited in any way to the insurance coverage required herein. SELLER shall not begin any construction work at the Facility Site under this Agreement until it has provided and the BUYER has approved all required insurance. Except as provided for under California law, all policies of insurance required hereunder must provide that the BUYER is entitled to thirty (30) days prior written notice (10 days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies. Maintenance of specified insurance coverage is a material element of this Agreement and SELLER's failure to maintain or renew coverage or to provide evidence of renewal during the term of this Agreement may be treated as a material breach of contract by BUYER.

33.3.2 Types of Insurance -

33.3.2.1 Commercial General Liability Insurance - SELLER shall provide at its expense a policy or policies of Commercial General Liability (CGL) Insurance which shall cover liability arising from premises and operations, XCU (explosions, underground, and collapse) independent contractors, products/completed operations, personal injury and advertising injury, property damage, and liability assumed under an insured's contract (including the tort liability of another assumed in a business contract). SELLER shall maintain the same or equivalent CGL Insurance as described herein for at least two (2) years following termination of the Agreement. Policy coverage shall in liability limits of not less than the following:

Limits of Liability

General Liability Limit

(Except Products/Completed

Operations) each occurrence/annual aggregate

\$3,000,000

Products/Completed

Operations Aggregate Limit \$3,000,000

Personal Injury Limit \$2,000,000

Each Occurrence \$2,000,000

33.3.2.2 Commercial Automobile Liability Insurance - SELLER shall provide at its expense a policy or policies of Commercial Automobile Liability Insurance providing coverage at least as broad in the amount of \$2,000,000 combined single limit per accident, covering bodily injury and property damage for owned, non-owned and hired automobiles ("Any Auto").

33.3.2.3 Workers' Compensation Insurance And Employers Liability Insurance - SELLER shall provide at its expense Workers' Compensation Insurance and Employers Liability Insurance to protect the SELLER against all claims under applicable state workers compensation laws. The BUYER, its elected officials, and employees will not be responsible for any claims in law or equity occasioned by the failure of the SELLER to comply with the requirements of this section. Limits for this insurance shall be not less than the following:

Workers' Compensation

Statutory

Employers Liability

Bodily Injury by Accident

\$1,000,000 each accident

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Bodily Injury by Disease	\$1,000,000 each employee
Bodily Injury by Disease	\$1,000,000 policy limit

By executing this Agreement, SELLER certifies to the following:

"I am aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for worker's compensation or to undertake self-insurance, in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of the Contract."

33.3.3 Rating Requirements - Except for the State Compensation Insurance Fund, all insurance required by this Agreement as described herein shall be carried only by responsible insurance companies with a rating of, or equivalent to, at least "A-, VI" by A.M. Best Company, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the BUYER.

33.3.3.1 Non-Admitted Carriers - The BUYER will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers (LESLI-list).

All policies of insurance carried by non-admitted carriers shall be subject to all of the requirements for policies of insurance provided by admitted carriers described herein.

33.3.4 Evidence of Insurance - The SELLER shall furnish to the BUYER documents, including but not limited to certificates of insurance and endorsements, or equivalent of certificates, as evidence for the insurance required herein. In this regard, SELLER shall provide BUYER with access to the website maintained by SELLER's insurance broker which includes memoranda of insurance coverage for SELLER.

33.3.5 Policy Endorsements

33.3.5.1 Commercial General Liability Insurance

33.3.5.1.1 Additional Insured - The policy or policies must be endorsed or otherwise structured to include as an additional insured the City of San Diego and its respective elected officials, officers, employees, agents, and representatives but only to the extent of SELLER's indemnity and performance obligations under this Agreement. The coverage shall include defense and liability arising out of: (a) Ongoing operations performed by Buyer or on its behalf, (b) SELLER's products, (c) SELLER's work, including but not limited to SELLER completed operations performed by SELLER or on its behalf, or (d) premises owned, leased, controlled, or used by SELLER. These endorsements shall not provide any duty of indemnity coverage for the established negligence of the BUYER or its respective elected officials, officers, employees, agents, subcontractors and representatives.

33.3.5.2 Commercial Automobile Liability Insurance - The Commercial General Automobile Policy required under Section 33.3.2.2 shall contain an endorsement on Industry Form MCS-90 for both SELLER and BUYER for hazardous material transportation and pollution liability

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33.3.5.2.1 Additional Insured - The policy or policies under Section 33.3.2.2 must be endorsed to include as an additional insured the BUYER and its respective elected officials, officers, employees, agents, and representatives, with respect to defense and liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the SELLER; Except provided that this endorsement shall not provide any duty of indemnity coverage for the established negligence of the BUYER or its respective elected officials, officers, employees, agents, subcontractors and representatives.

33.3.5.3 Waiver Of Subrogation - The policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against the BUYER, and its respective elected officials, officers, employees, agents, and representatives for losses paid under the terms of the policy or policies and which arise from work performed by the SELLER pursuant to this agreement.

33.3.6 Deductibles/Self-Insured Retentions - SELLER shall be responsible for the payment of all deductibles and self-insured retentions.

33.3.7 Notice Of Changes To Insurance - SELLER shall notify the BUYER 30 days prior to any material change to the policies of insurance provided under this Agreement.

33.3.8 Restriction on Start of Site Work - The SELLER shall not perform any construction work at the Facility Site work unless the SELLER has in full force and effect all required insurance. The SELLER shall not allow any sub-consultant and subcontractor, supplier, or other organization to perform work at the Facility Site unless the worker's compensation requirements have been met.

33.3.9 Additional Insurance

33.3.9.1 Workers' Compensation Insurance For Work In, Over, Or Alongside Navigable Waters -

In addition to the Workers' Compensation Insurance required under this Agreement, Buyer shall provide additional insurance coverage for claims brought under the Longshore and Harbor Workers' Compensation Act, the Jones Act, general maritime law, and any other federal or state laws, resulting from Contractor's work in, over, or alongside navigable waters.

34. Excused Non-Performance

34.1 Any failure, in whole or in part, by either Party timely to perform any obligation on its part to be performed under this Agreement (except the obligation to pay money when due) shall be excused to the extent that such failure is caused by a Force Majeure event. Upon the occurrence of a Force Majeure event, the Party seeking to be excused from performance of its obligation hereunder shall give reasonably prompt Notice thereof to the other Party, stating that there will be a delay or nonperformance.

34.2 Each time that, due to any Force Majeure event, BUYER takes no Product for five (5) or more consecutive days, the Supply Period shall be automatically extended for the same number of full days. Such number of full days shall be determined by dividing twenty-four into the number of hours during which any such failure to deliver continued and disregarding any fractional remainder. Notwithstanding the foregoing, the aggregate of all such full days effecting such an extension hereunder because of circumstances affecting BUYER shall not exceed three hundred sixty-five (365) days. During a Force Majeure event, and only during a Force Majeure event, BUYER shall be excused from paying to SELLER the Minimum Power Charge provided for in this Agreement. To the extent that BUYER claims a Force Majeure event, however, SELLER may, in its sole discretion and as permitted by law, sell any Electricity

from the Energy System into the market operated by the California ISO during the Force Majeure for SELLER's sole benefit.

35. Confidentiality

- 35.1 Confidential Information. To the fullest extent permitted by law, recognizing that BUYER is a public entity and subject to certain requirements regarding public disclosure of non-proprietary information, the parties agree to hold and treat as secret and confidential throughout the term of this Agreement any and all proprietary and confidential information disclosed by the other party (the "Disclosing Party") to the other party (the "Receiving Party") including, but not limited to, know-how, procedures, operating techniques, customer lists or identities, equipment specifications, analytical specifications, process designs, drawings, prints, technical information and data, business, financial, pricing or other trade information ("Confidential Information") in writing, or, if disclosed orally, confirmed in writing to be confidential, using with respect to such Confidential Information the same standards and procedures which Receiving Party applies to its own confidential information. Notwithstanding the foregoing, "Confidential Information" shall not include information which: (i) at the time of the disclosure, is a part of the public domain; (ii) subsequently becomes a part of the public domain by publication or otherwise through no fault of the party disclosing the information; (iii) the Receiving Party can show was contained in writing in its possession at the time of disclosure, which information had not been wrongfully acquired, directly or indirectly, from the Disclosing Party and with respect to which no obligation of confidentiality exists; (iv) is substantially disclosed to Receiving Party by a third party not in violation of any rights of, or obligations to, the Disclosing Party hereto; or (v) is required to be disclosed by law, including but not limited to the California Public Records Act; provided that, for each of the foregoing exceptions, the Receiving Party provides the Disclosing Party with written documentation evidencing the same upon request of the Disclosing Party.
- 35.2 Legally required disclosure. The foregoing to the contrary notwithstanding, if disclosure of any Confidential Information of the Disclosing Party is legally required to be made by the Receiving Party in or pursuant to a judicial, administrative or governmental proceeding or order or similar proceeding or order of a self-regulatory organization, the Receiving Party may make such disclosure but only to the extent required to comply with the law; provided, however, that if required, Receiving Party will cooperate if Disclosing Party seeks a protective order or other legal action to resist such disclosure and shall limit such disclosure to the minimum required.
- 35.3 Intellectual Property. SELLER shall be the sole owner of, and BUYER shall acquire no rights in, any and all intellectual property associated with SELLER's Plant and its operations. BUYER shall not have the right to use or reproduce any of SELLER's equipment, processes, operations or systems without the written consent of SELLER.

36. Dispute Resolution

- 36.1 Any Dispute, which has not been concluded by the Parties following good-faith negotiation, shall be resolved as follows:
- 36.1.1 The disputing Party shall provide Notice to the other Party identifying the Dispute;
- 36.1.2 The Parties shall attempt to resolve the Dispute through good faith negotiations, including participation of the respective senior executives of the Parties, for an additional period of thirty (30) days from the Notice above; and
- 36.1.3 If the Parties fail to resolve the dispute by the end of such thirty (30) day period, then a Party may elect to submit such Dispute to nonbinding mediation by providing Notice to the other Party, detailing the full particulars of the nature of the Dispute. Within sixty (60) days after the date of such Notice, the Dispute shall be submitted for nonbinding mediation in the County of San Diego, California. The mediator shall be jointly selected by the Parties. If such nonbinding mediation does not resolve the Dispute within ninety

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(90) days after submission for mediation, either Party may, at any time thereafter, file an action relating to the Dispute in accordance with the provisions of Section 37.9. The foregoing shall constitute the sole procedure for resolution of any Dispute.

37. General Provisions

37.1 SELLER acknowledges that SELLER, its employees, contractors, subordinates and assigns are not entitled to any Relocation Payment or Relocation Advisory Assistance, or costs pursuant to the Government Code Sections 7260 et seq., or any regulations implementing or interpreting such sections.

37.2 SELLER and each individual executing this Agreement on behalf of SELLER jointly and severally represent and warrant that each individual signing is duly authorized to execute and deliver this Agreement on behalf of said entity in accordance with the SELLER's articles of organization, by laws, or other charter documents of said corporation, and that this Agreement is binding upon said corporation in accordance with its terms.

37.3 BUYER and each individual executing this Agreement on behalf of BUYER jointly and severally represent and warrant that each individual signing is duly authorized to execute and deliver this Agreement on behalf of said entity in accordance with the BUYER's articles of organization, by laws, or other charter documents, and that this Agreement is binding upon the BUYER in accordance with its terms.

37.4 The language in all parts of this Agreement shall in all cases be construed simply and according to fair meaning and not strictly for or against either of the parties.

37.5 This Agreement does not constitute and the parties hereto do not intend it to create between BUYER and SELLER a partnership or a joint venture, or the relationship of master and servant, or principal agent. SELLER and any and all agents and employees of SELLER shall act in an independent capacity and not as officers or employees of BUYER.

37.6 If any provision of this Agreement shall be declared void or unenforceable by any judicial or administrative authority, the validity of any other provision and of the entire Agreement shall not be affected thereby and it is the intention of the Parties that any such provision be reformed so as to make it enforceable to the maximum extent permissible under applicable law.

37.7 This Agreement may only be terminated, modified or amended by written mutual consent of the parties, except as otherwise provided herein.

37.8 This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages to this Agreement may be exchanged by facsimile.

37.9 This Agreement shall be governed by the laws of the State of California and any disputes between the parties shall be brought in the Superior Court of the County of San Diego.

37.10 The exercise of any right, option or privilege existing at law or by virtue of this Agreement, by either Party, shall not preclude such Party from exercising any and all other such rights, options and privileges, and such Party's failure to exercise any such right, option or privilege shall not be deemed a waiver thereof, nor shall it relieve the other Party from its obligations to perform each and every term, covenant, provision and condition on its part to be performed pursuant to the provisions of this Agreement or required by law, nor shall it relieve the other Party from damages and other remedies for its failure to perform or meet its obligations to the Party holding the right option or privilege at issue.

37.11 No amendment, modification, change, waiver or discharge of, or addition to, any provision of this Agreement shall be effective unless set forth in writing and signed by an authorized individual on behalf of each Party, and unless such writing specifically states that the same constitutes such an amendment,

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modification, change, waiver or discharge of, or addition to, one or more provisions of this Agreement. The waiver by a Party, except as is hereafter provided, of any breach of any term, covenant, provision or condition of this Agreement by the other Party shall not be deemed to be a waiver of such term, covenant, provision or condition nor any subsequent breach of the same, nor any other term, covenant, provision or condition of this Agreement regardless of a Party's knowledge of such preceding breach at the time of its acceptance of such payment or performance.

37.12 Notwithstanding anything in this paragraph to the contrary, a Party may waive any term, covenant, provision or condition of this Agreement, or any known breach thereof, and the Party may waive any of its known rights, options or privileges provided; however, such waiver must be expressed and not by implication and must also be in writing duly executed by the Party waiving said term, covenant, provision or condition and delivered to the other Party.

37.13 The Parties may, from time to time, use purchase orders, acknowledgments or other instruments to order, acknowledge or specify delivery times, suspensions, quantities or other similar specific matters concerning the Product or relating to performance hereunder, but the same are intended for convenience and record purposes only, and any provisions which may be contained therein are intended for convenience and record purposes only and any provisions which may be contained therein are not intended to (nor shall they serve to) add to or otherwise amend or modify any provision of this Agreement, even if signed or accepted on behalf of either Party with or without qualification.

37.14 The terms of this Agreement and covenants and agreements herein contained shall apply to and shall bind and inure to the benefit of the heirs, representatives, assigns and successors in office or function of the parties hereto.

37.15 The Section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement or of any provision hereof.

37.16 This Agreement, Exhibits attached hereto and hereby make a part hereof, sets forth the entire agreement between SELLER and BUYER with respect to the production, purchase and sale of Product for use at BUYER's Facility. This Agreement supersedes and cancels all prior and contemporaneous agreements and understandings between the Parties, oral or written, relating to the production, purchase and sale of Product for use at BUYER's Facility. This Agreement, including the Exhibits attached hereto, is not intended to confer upon any person other than BUYER and SELLER any rights or remedies hereunder.

37.17 SELLER shall pay all royalties and license fees that may be required for methodology, techniques, and for other intellectual property, in connection with, operating the Energy System. SELLER shall indemnify the BUYER against and defend all suits or claims for infringement of any patent, copyright, trade secret, trade name, trademark or any other proprietary or contractual rights and shall hold BUYER harmless from loss, expense, claim, or cost on account thereof.

37.18 SELLER shall grant the BUYER a non-exclusive, non-transferable right to use any intellectual property rights relating to the Energy Systems installed at the Facility. Nothing in this section shall abrogate the rights of the SELLER or third parties to copyright, patents or other rights that are separate from the design of the Energy System at the Facility. Should this Agreement terminate, expire or SELLER enters into default and the Energy System remains upon BUYER property beyond the time to remove the Energy System as set forth in Section 23, the BUYER's non-exclusive, non-transferable right to use any intellectual property rights relating to the Energy Systems shall remain vested with the BUYER for this Facility.

37.19 Equal Opportunity Contracting Program. SELLER shall comply with the City of San Diego's Nondiscrimination in Contracting Ordinance, San Diego Municipal Code Sections 22.3501 through 22.3517. SELLER and all subcontractors for SELLER shall comply with the City of San Diego's Equal Employment Opportunity Outreach Program, San Diego Municipal Code Sections 22.2701 through 22.2707. SELLER shall not discriminate on the basis of race, gender, religion, national origin, ethnicity,

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sexual orientation, age, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, or suppliers. SELLER shall provide equal opportunity for subcontractors to participate in subcontracting opportunities. SELLER agrees to a voluntary goal of 15% MBE/WBE/DBE/DVBE/OBE financial involvement in work performed on site and to make good faith effort to ward this goal. SELLER understands and agrees that violation of this clause shall be considered a material breach of the contract and may result in contract termination, debarment, or other sanctions.

37.20 Drug Free Workplace. SELLER shall have in place a drug-free workplace program that complies with the requirements of the San Diego City Council Policy Number 100-17 regarding Drug-Free Workplace and shall ensure that each subcontract agreement having to do with the design, construction and operations of the SELLER's Plant contains language which indicates the subcontractors' agreement to abide by the provisions of the above referenced policy.

37.21 Sections 21, 33, 35, 36, and 37.19 shall survive the termination or expiration of this Agreement.

37.22 Time is of the essence in this Agreement.

BUYER

SELLER

By _____

By _____

Linde Merchant Production Inc.

Attorney

Exhibit A**Electricity Purchase Price & Minimum Power Charge****1. Electricity Purchase Price.**

For a minimum period of five (5) years from the Commissioning Date and for as long as the Point Loma Agreement and this Agreement is in effect, the Electricity Purchase Price will be equal to the Base Price on a per kWh basis adjusted for inflation/deflation as detailed in Table A-1 below.

TABLE A-1	
Base Price	US\$ 0.106 per kWh*
Effective Date of Base Price	June 1, 2008
Base Period Index	Bureau of Labor Statistics PPI "San Diego CPI", CUUSA4224SA0 average for 2007
Initial Adjustment Date	June 1, 2013
Subsequent Adjustment Dates	Annually, on June 1 st of each year following the Initial Adjustment Date
Adjustment Methodology	Divide the Annual Average index for the calendar year prior to the adjustment date by the Base Period Index, and then multiply by the Base Price.
Additional information	Method to be used follows the Simple Percentage Method as described by <i>BLS Report 807, Escalation and Producer Price Indexes: A Guide for Contracting Parties.</i>
*Note	Base price is equal to gross price of US \$0.122 per kWh less \$0.016 per kWh for consideration included in the Point Loma Agreement

In the event that the SELLER's agreement to source fuel for the Energy System from the Point Loma Biogas Source is terminated, beginning on the first day of June following discontinuation of the Point Loma Biogas Source, the Electricity Purchase Price will be equal to the Base Facility Fee on a per kWh basis adjusted for inflation/deflation as detailed in Table A-2 below. In addition, the BUYER will be responsible for paying for the natural gas required to fuel the Energy System. At the BUYER's option, the natural gas required can either be provided directly by the BUYER or purchased through the SELLER.

TABLE A-2	
Base Facility Fee	US\$ 0.071 per kWh
Effective Date of Base Facility Fee	June 1, 2013
Base Period Index	Bureau of Labor Statistics PPI "Industrial Electric Power Index", WPU0543 Annual average for 2012
Initial Adjustment Date	June 1, 2014
Subsequent Adjustment Dates	Annually, on June 1 st of each year following the Initial Adjustment Date
Adjustment Methodology	Divide the Annual Average index for the calendar year prior to the adjustment date by the Base Period Index, and then multiply by the Base Facility Fee.
Additional information	Method to be used follows the Simple Percentage Method as described by <i>BLS Report 807, Escalation and Producer Price Indexes: A Guide for Contracting Parties.</i>

2. Minimum Power Charge.

Subject to the provisions of Article 34, for each month of the Supply Period, the Minimum Power Charge payable by BUYER to SELLER for Energy supplied by the BUYER to SELLER will be equal to the Electricity Purchase Price in effect for that month multiplied by fifty percent (50%) of the maximum kilowatt hour output of Electricity as described in the Energy System Description. In the event that the BUYER's failure to purchase Electricity in that month was a direct result of the SELLER's failure to make Electricity available to the BUYER for purchase, then the maximum kilowatt hour output of Electricity utilized in the calculation of the Minimum Power Charge for that month shall be adjusted accordingly to the fuel cell's availability for that month, provided, however that the SELLER's failure to make Electricity available to the BUYER for purchase is not a direct result of BUYER's demand falling below eighty percent (80%) of maximum kilowatt hour output of Electricity as described in the Energy System Description.

For example, the calculation would be as follows:

Days in the month	= 31 days
Maximum kilowatt output of Energy System	= 1,200 kw's
Electricity Purchase Price for the month	= \$0.106 per kwh
Maximum kwh output for the month	= 31 days x 24 hours x 1,200 kw = 892,800 kwh's
Hours that Energy System was not available	= 32 hours in the month (assumption)
Reduction of Maximum kwh output	= 892,000 kwh - (32 hours)x(1200 kw's) = 853,600 kwh's
Minimum Power Charge for the month	= 50% x 853,600 x \$0.106 = \$45,240.80

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Exhibit B**Energy System Description**

[Description of Energy System including: facility requirements; utility requirements; interfaces; quality and quantity specifications (i.e., capacity, voltage, power factor, temperature, pressure, flow, heat content, tube trailers, filling system, etc.), and Basic Plan View Layout of the Energy System]

The South Bay Energy System installation for this project is comprised of a fuel cell which utilizes a renewable fuel gas as its feed, producing electricity directly for distribution. The fuel cell, a model DFC-1500B from Fuel Cell Energy, produces 1.2MW of continuous 3-phase electrical power from refined excess digester gas produced at the City of San Diego's Point Loma Waste Water Treatment Plant.

Seller will refine and compress the gas at its Pt. Loma site and transport the fuel to the fuel cell site in DOT-approved tube trailers as CNG. The gas is unloaded directly from the tube trailers to the fuel cell; there is no separate on-site fuel storage other than the parked trailers. An unload station is provided for each trailer parking site, with controls which provide for sequentially changing from an empty trailer to a full trailer. The fuel transport operation will require two trailer deliveries per 24-hour day.

Pipeline natural gas is supplied to the fuel cell as backup to the digester gas, to provide uninterrupted service in the event of transportation delays or interruptions to the Pt. Loma gas operations.

Electrical specifications for the Fuel Cell are provided in Table B-1.

Table B-1: DFC-1500 Electrical Output Ratings	
Rated Powerplant Output	1,200 kW AC, net
Power Conversion Capacity	1,200 kW, 1333 kVA AC, net
Output Voltage	12.47 kV 3-phase, Wye configuration
Output Current at Rated Power	62 Amps (per phase) at 12.47 kV
Output Current Maximum Fault	68 Amps (110% of Max. RMS Current)
Short Circuit Current	68 Amps (110% of Max. RMS Current)
Nominal Output Frequency	60 Hz
Output Frequency Range	+/- 0.5 Hz
Base Load Operating Range	0 - 100%
Reactive Capability at Full Load	0.9 lag / lead
Output Current Harmonics	<5% Total Harmonic Distortion, complies with standard IEEE 519 requirements.
Grid Protection	Per UL 1741, Calif. Rule 21 requirements

Utility Requirements for the Energy System are provided in Table B-2.

Table B-2: Utility Requirements	
Water (Potable or Industrial non-potable) (1)	55-60 psig at all flow conditions Ave. Flow = 3.5 gpm Peak Flow = 15 gpm (during backflush)
Waste Water to Drain (clean water only)	Ave. Flow = 1.7 gpm Peak Flow = 15 gpm
Natural Gas (pipeline)	15 psig @ flow = 156 scfm at cell connection
Electrical Interconnect	See electrical specification, Table B-1.
Telephone Data Line	TBD (for utility monitoring of interconnect)
High-speed Data Line	TBD

(1) If local water supply does not meet FCE standards, the system will include additional water treatment equipment. Water use requirements may increase somewhat as a result, the increase dependent on the supply water quality issues.

Facility Requirements and Conditions are outlined in Table B-3.

Table B-3: Site and Facility Conditions	
Exposure	Equipment rated for outdoor installation
Elevation above Sea Level	0 to 5000 ft.
Relative Humidity	0 to 100%
Wind Loading @ 33' above grade	30 PSF (<90 mph, Exposure C)
Precipitation	2.5 inches/hour
Seismic	UBC Zone 4
Ambient Dust Loading (Ave./year)	27 ug/m ³
Halides, Halogens, Hypochlorites (Ave./yr)	<20 ppbv
Sulfur Dioxide (Ave./yr)	<10 ppbv
Truck Access	43' tube trailer + tractor

Discharges from the Energy System are as outlined in Table B-4.

Table B-4: System Discharges	
Waste Water	See Table B-2.
Noise	72 dB(A) at 10'
Waste Heat	Exhaust Temp. = 650 deg.F Backpressure allowable < 5" w.g. Flow = appx. 14,030 lb.hr BTU/hr ~ 1,900,000 (650 deg. - 250 deg.)
Emissions	NOx < 210 lb/year

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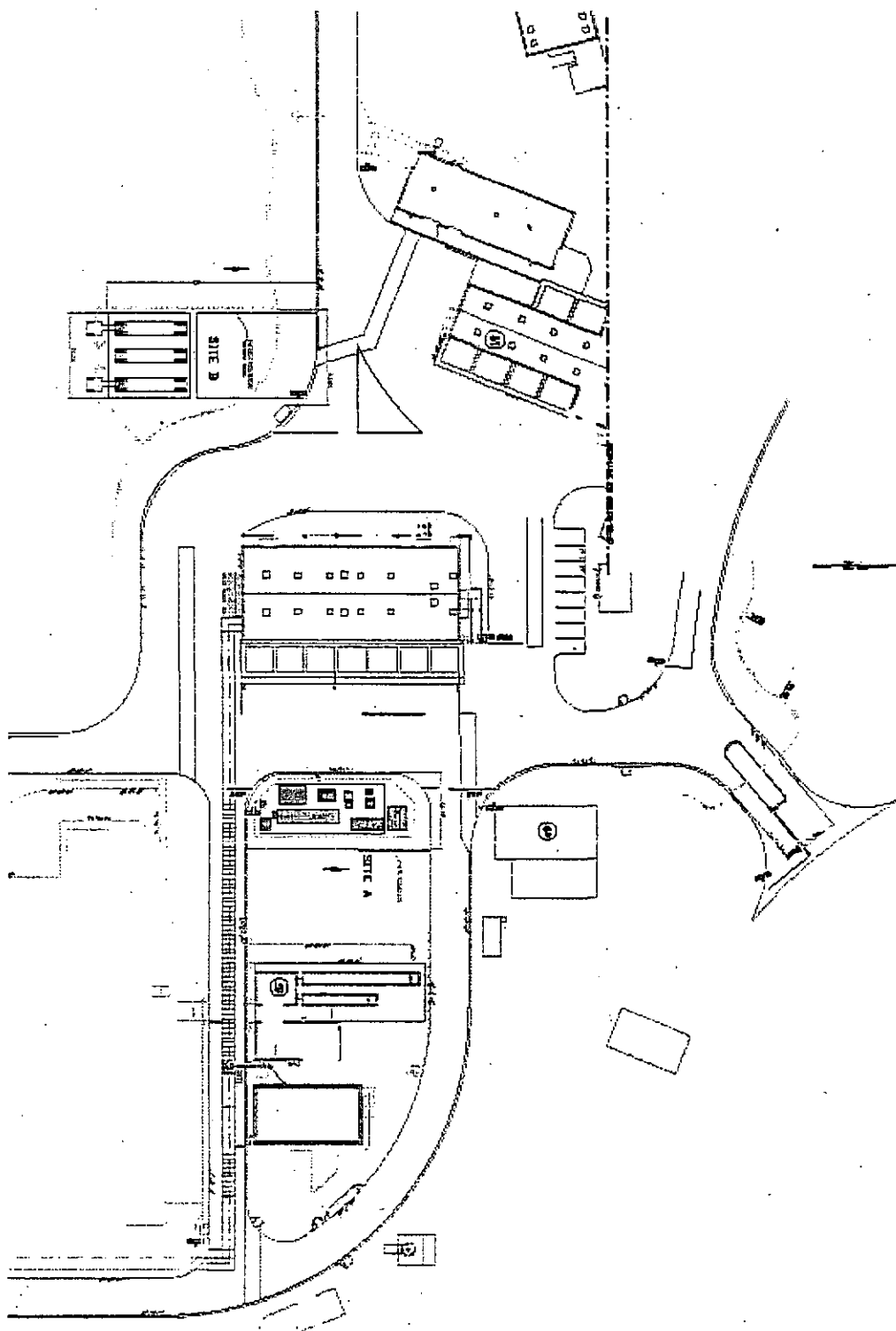
	SOx < 10.5 lb/year CO < 1,050 lb/year
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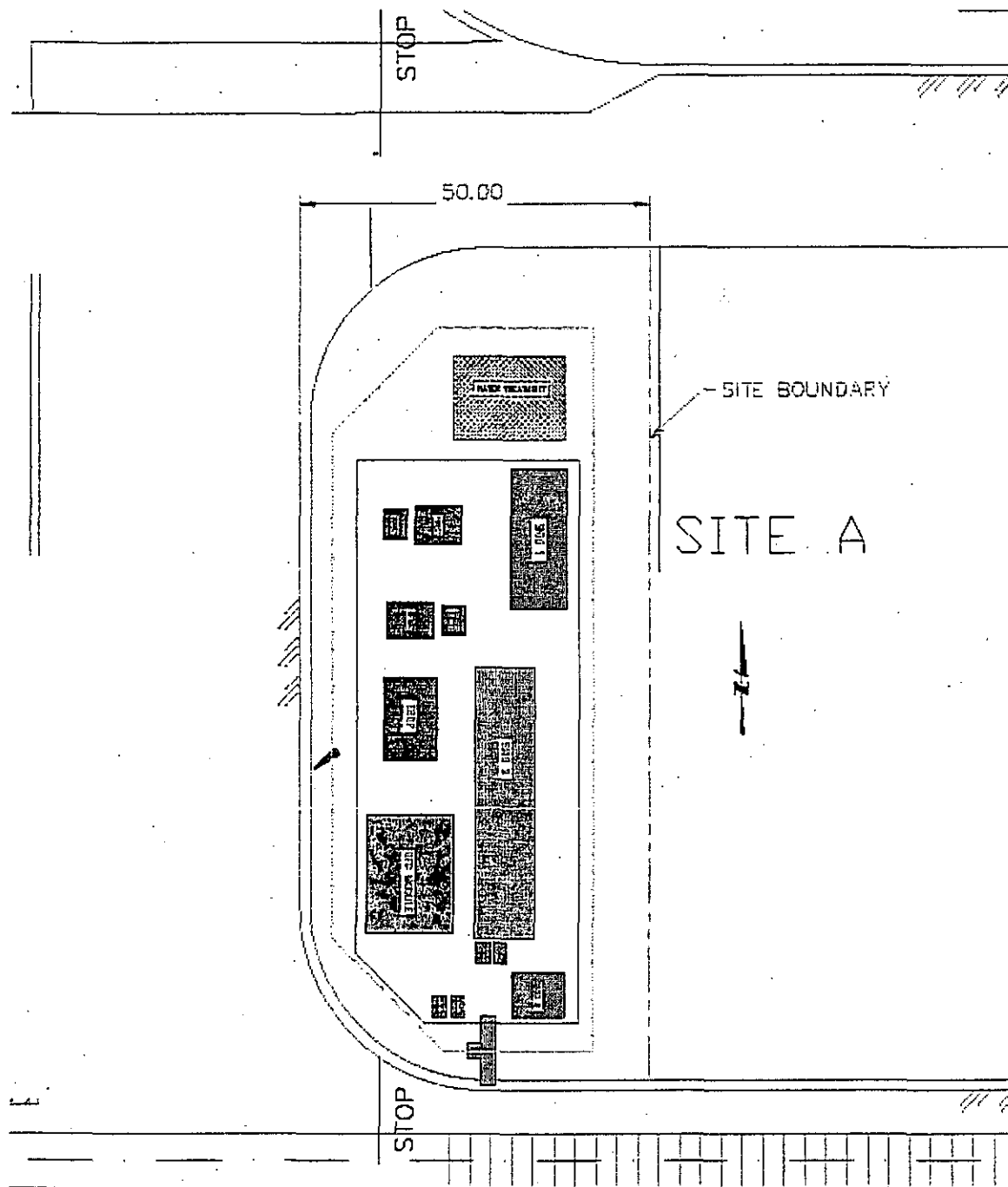
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Exhibit B1

**Energy System Description
Preliminary Energy System Site Drawings and Basic Plan View Layout**





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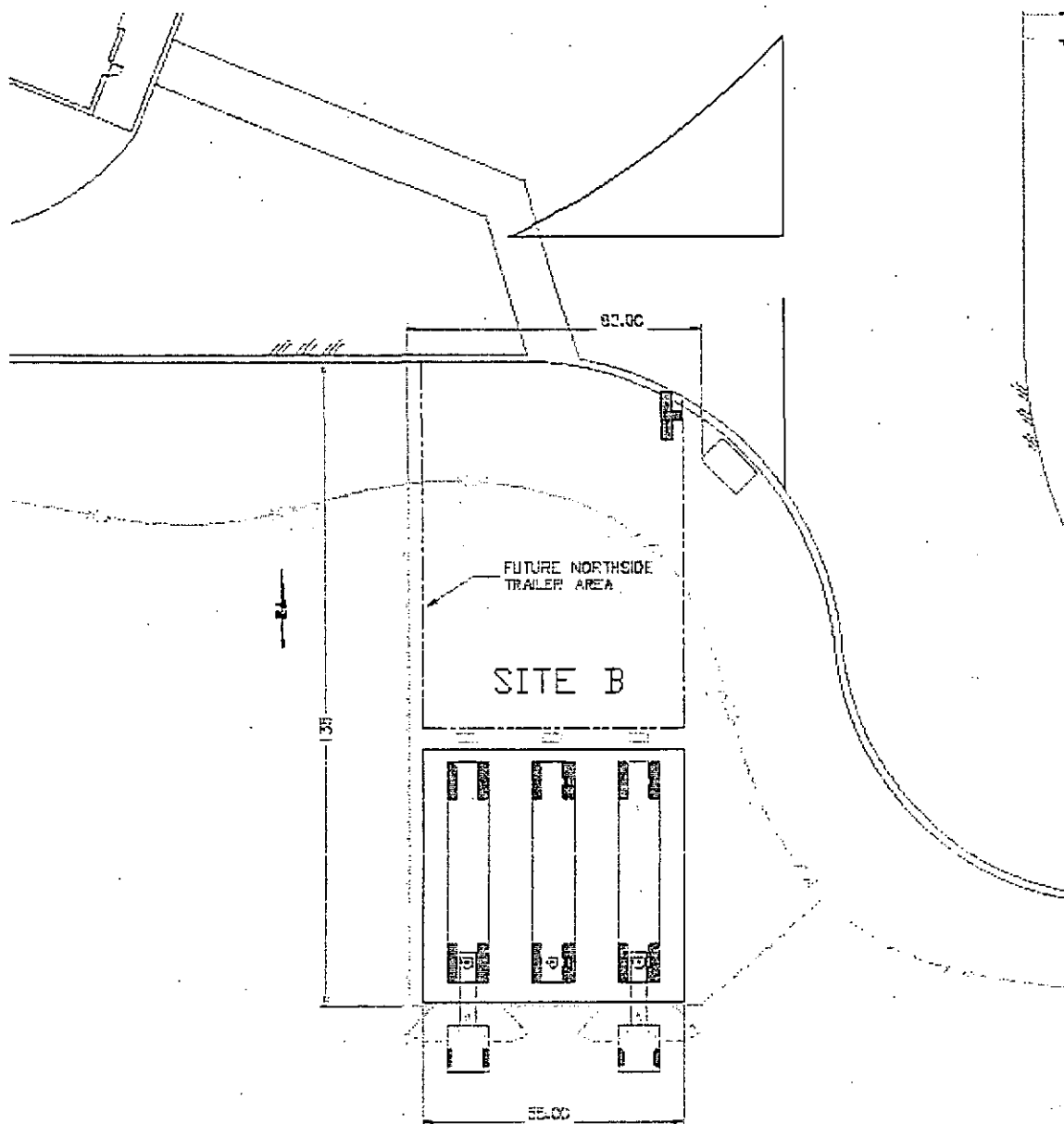


Exhibit C**Project Schedule**

Schedule based on May 16, 2008 NTP and is subject to approvals and permits and including any conditions such as completion of the Biogas Plant at Point Loma WWTP

5/23/08 Submit Updated Schedule

7/7/08 Final Design

8/19/08 Fuel Cell Installation Begins

11/17/08 Begin Start Up

12/26/08 Generate Power

1/9/09 Project Completion

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Exhibit D Project Design Plans

The 30% Complete set of Project Design plans and specifications shall include the drawings, information or items indicated below with an asterisk (*)

The Fully Complete set of Project Design plans and specifications shall include all of the following:

- **Drawings.** Drawing size will be 11" x 17".
Drawings related to WWTP site modifications that are outside the Energy System Site Lease will be prepared in the Micro Station format meeting BUYER's Clean Water Program Guidelines.

Existing underground piping, conduit and structure in all areas of work will be shown in detail on the 30% Project Design plans.

Equipment Data Sheets or "cut sheets," that are tied to notes on the drawings and clearly delineated to the product being supplied, may be substituted for details or specifications.

CIVIL/SITE/STRUCTURAL

- *Overall site plan showing all utilities outside the leased sites and location of interfaces with all Buyer utilities, site boundaries, site entrances, packaged units and associated equipment
- *Details of interfaces with any Buyer utilities.
- *Roads, driveways, and equipment pads
- *Design for site storm water management
- *Site earth work and retaining walls design and sections of walls.

LANDSCAPING AND ARCHITURAL

Project shall developed in accordance with the SBWRP Architectural and Landscaping and Art Theme.

*Two elevations of each Energy System Site location,

Site lighting plan.

Landscaping plan

MECHANICAL

- *Mechanical equipment layout
- Interconnecting piping inside the Energy System Site

- *Packaged units outside general dimensions, and in the Fully Complete Design, connection points. (May be manufacture's drawings and data sheets in the Full Design)
- Location of Heat Recovery connections and required flow and pressure requirements if the SBWRP decides to use these connections in the future.
 - *Water system design

ELECTRICAL

- *Electrical Site Plan
 - *NFPA AND CALOSHA electrical hazard classes clearly indicated for all areas and other electrical hazard class restrictions or any other hazard restrictions.
- *One Line Diagrams
- *All protection and paralleling details as per SDG&E requirements. Any necessary interface with and/or modifications to the existing plant switch gear.
- *Plan Showing Location of new and existing Switch Gear and MCCs and required SBWRP connections.
- Power monitoring concepts and location of kWh meter(s)
- Elevations of switch gear and MCCs (may be manufacture's drawings and data sheets)
- PVC coated rigid metal conduit will be required for above ground applications off the Energy System Site.
- DCS emergency shutdown control interface information any control logic changes and I/O data for: emergency stops, general alarm warning to the SBWRP operator, major breaker status and energy data and kW output. DCS connection designs and DCS controls related submittals shall be in accordance with the Clean Water Program Guidelines.

DIGESTER GAS

- *Layout of above and underground pipes, and truck header and connections, truck staging and unloading area, turning radius and operator rain cover.

Exhibit E

SAFETY AND EMERGENCY PLAN

The Seller shall prepare and submit a "Safety Plan" describing the various safety elements of the facility construction and its operation. The Seller shall include a narrative describing any previous incidents involving "safety issues" that have occurred in similar facilities operated by Buyer. The "Safety Plan" should describe the following:

- a. The Companies Safety Policy
- b. Safety engineering measures including but not limited to the following:
 1. Equipment safety features and ergonomic design;
 2. Odor and noise control
 3. Fire and explosion prevention and control features;
 4. Adequate enclosure ventilation; and
 5. Required personal protective equipment.
 6. Trucking procedures
 7. Gas transfer procedures
 8. Filter maintenance procedures
- c. Definition of responsibilities and identification of a safety chain of command
- d. Identification of how the safety plan meets all local, state, and federal safety regulations

If a particular risk is present (i.e., fire or explosion potential), methods to provide a safe environment shall be described. The plan would be incorporated as a part of the facility O&M manual. The Seller shall provide the Buyer with Job Safety Analysis (JSA) (Project Safety Review) and comply with the Seller's Safety Requirements during construction of this Facility.

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THE CITY OF SAN DIEGO

MARCH 25, 2008

SOUTH BAY WATER RECLAMATION PLANT FUEL CELL SITE LEASE
(Energy System Site Lease)

LINDE / CITY

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**CITY OF SAN DIEGO
SOUTH BAY FUEL CELL SITE LEASE**

THIS LEASE AGREEMENT is executed between THE CITY OF SAN DIEGO, a municipal corporation, hereinafter called "CITY," and Linde Merchant Production Inc., formerly known as BOC Merchant Production Inc., a wholly owned subsidiary of Linde, Inc. hereinafter called "LESSEE", to be effective as of the date of execution by CITY (the "Commencement Date"), when signed by the parties and approved by the San Diego City attorney, as follows:

SECTION 1: PREMISES AND USES

Concurrent with this lease, the parties are entering a Power Purchase Agreement for the Purchase and Sale of Electricity (Power Purchase Agreement or "PPA"). The purpose of this lease is to provide LESSEE property upon which to perform its PPA project obligations. The PPA is hereby expressly incorporated in this lease.

1.1 Premises.

CITY hereby leases to LESSEE under an exclusive lease and LESSEE leases from CITY all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described in Exhibit "A.1" consisting of approximately 5,649.64 square feet of land area. Attached hereto and by this reference made part of this agreement, said real property is a portion of the South Bay Water Reclamation Plant ("SBWRP"). Said real property is hereinafter called the "Lease A Premises" or "Leased Premises A" which shall be the primary location of LESSEE's South Bay Fuel Cell ("SBFC") project facilities and operations.

CITY hereby leases to LESSEE under an exclusive lease, and LESSEE leases from CITY, all of that certain real property situated in the City of San Diego, County of San Diego, State of California, described in Exhibit "A.2" consisting of approximately 11,647.33 square feet of land area. Attached hereto and by this reference made part of this agreement, said real property is a portion of the SBWRP. Said real property is hereinafter called the "Lease B Premises" or "Leased Premises B."

Appurtenant Easements will be granted by the CITY as required to provide utilities (natural gas, electrical, etc.) to the Lease sites.

1.2 Uses.

It is expressly agreed that the premises are leased to LESSEE solely and exclusively for the purposes of receiving, storing, repair, servicing of equipment, distributing, and delivering compressed digester gas for use in a 1.2 MW fuel cell to produce electricity to be sold by LESSEE to CITY, now or in the future, under the express terms and conditions provided by the PPA. Generation of said electrical power related to LESSEE'S business is allowed, provided that such electrical generation is in compliance with all applicable laws. Retail sales of LESSEE'S products to other customers other than the SBWRP is prohibited, except in accordance with the PPA, and for such other related or incidental purposes as may be first approved in writing by the CITY.

The use of the premises for any unauthorized purpose shall constitute a substantial default and subject this lease to termination at the sole option of the CITY.

LESSEE covenants and agrees to use the premises for the above-specified purposes and to diligently pursue said purposes throughout the term hereof. Failure to continuously use the

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premises for said purposes, or the use thereof for purposes not expressly authorized herein, shall be grounds for termination by CITY.

1.3 Related Council Actions.

By the granting of this lease, neither CITY nor the Council of CITY is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the premises. Discretionary action includes but is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals, which may be required for the development and operation of the leased premises.

1.4 Quiet Possession.

LESSEE, paying the payments required by this Lease and PPA, and performing the covenants and agreements herein, shall at all times during the term peaceably and quietly have, hold, and enjoy the premises. If CITY for any reason except as described in 6.10 herein or Section 23 of the PPA cannot deliver possession of the premises to LESSEE at the commencement of the term, or if during the lease term LESSEE is temporarily dispossessed through action or claim of a title superior to CITY'S, then and in either of such events, this lease shall not be voidable, and the provisions of Section 3.5 of the PPA will apply. In any event, CITY shall not be liable to LESSEE for any loss or damage resulting therefrom.

1.5 Easements and Reservations.

- a. CITY hereby reserves all rights, title, and interest in any and all subsurface natural gas, oil, minerals, and water on or within the premises.
- b. CITY reserves the right to grant and use easements or to establish and use rights-of-way over, under, along, and across the leased premises for utilities, thoroughfares, or access, as it deems advisable for the public good.
- c. CITY has the right to enter the premises for the purpose of operating or making repairs to or developing WWTP resources and services.

However, CITY shall not unreasonably or substantially interfere with LESSEE'S use of the premises and will reimburse LESSEE for physical damages, if any, to the permanent improvements located on the leased premises resulting from CITY exercising the rights reserved in this section. Such reimbursement may include a reduction in the payment proportionate to the amount of physical damage as determined by CITY. CITY will pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

LESSEE acknowledges the leased premises is located contiguous to land used by a CITY department. The leased premises will require shared use of access, ingress and egress. CITY hereby grants to LESSEE right of way for ingress and egress to the Lease sites including use of SBWRP roads in this regard.

- d.
- e. CITY shall grant to LESSEE necessary appurtenant easements for utilities to serve LESSEE'S facilities on the leasehold premises. Such proposed easements shall be identified in LESSEE'S design for its facilities prepared pursuant to the PPA. CITY'S approval of appurtenant easements will be conditioned on non-interference with CITY'S facilities and planned operations, and will not otherwise be unreasonably withheld.

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1.6 Competent Management.

Throughout the term of this lease agreement, LESSEE shall provide competent management of the leased premises to the satisfaction of the CITY. For the purposes of this paragraph, "competent management" shall mean demonstrated ability in the management and operation of a Energy System electrical generation facility and related activities in a clean, safe, maintained, and fiscally responsible manner.

1.7 Operation of Energy System.

The Energy System will be operated twenty-four hours per day. The trucks will be scheduled around the requirements of the Energy System and the performance of the SBWRP and the Point Loma Agreement.

1.8 Political Activities.

The leased premises shall be used exclusively for the purposes specified in Section 1.2, Uses, hereof. The premises shall not be used for working or campaigning for the nomination or election of any individual to any public office, be it partisan or nonpartisan.

SECTION 2: TERM2.1 Term.

The term of this Lease shall be concurrent with period provided in Section 11.1 of the PPA provided, however, that term "Lease Year" as used in this Lease shall be exclusive of the Development Period, and shall mean the 12-month period commencing on the first day of the month following the Commissioning Date of LESSEE's Energy System. After the Commissioning Date the CITY may terminate this Lease under any applicable conditions described in the PPA.

2.2 Site Development Period.

Prior to commencement of the ten (10) Lease Year operating term LESSEE, or LESSEE's designated agents, shall have the right under this Lease to enter upon the Leased Premises as long as the PPA is in effect, to survey and assess the property for feasibility of constructing, installing, operating and maintaining the Energy System as called for in PPA. LESSEE is granted in this Lease a Site Development Period to construct and otherwise develop its facilities for a period of time not to exceed the construction term described in Section 14.5 of the PPA. Consistent with Section 11 of the PPA, the ten (10) Lease Year term shall end on the last day of the month following the tenth (10th) anniversary of the Commissioning Date, unless otherwise extended as provided for in the PPA.

2.3 Lease Contingencies.

This Lease is contingent upon the contractual terms and conditions of the PPA. Any condition requiring or allowing the termination of the PPA by either party shall also be grounds for the termination of this Lease by either party.

2.4 Holdover.

Any holding over by LESSEE after expiration or termination shall not be considered as a renewal or extension of this Lease. The occupancy of the premises after the expiration or termination of this agreement constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect; provided, however, CITY shall have the right to

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apply a reasonable adjustment in payment to bring the payment to fair market value and to terminate the holdover tenancy at will.

2.5 Quitclaim and Surrender of LESSEE'S Interest.

On termination of this Lease, LESSEE shall deliver to CITY a quitclaim deed in recordable form quitclaiming all its rights in and to the premises. CITY may record such deed only on the expiration or earlier termination of this Lease. In the event that CITY requires any subsequent quitclaim deed, LESSEE or its successor in interest shall deliver the same within ninety (90) days after receiving written demand.

At the expiration or earlier termination of this Lease, LESSEE shall surrender the premises to CITY free and clear of all liens and encumbrances, except those liens and encumbrances, which existed on the date of execution hereof, and in a decent, safe, and sanitary condition. In the case of termination of this Lease by CITY prior to the end of the specified lease term, any liens and encumbrances must be approved in writing by the CITY.

2.6 Option to Extend.

Any extension of the Term of this Lease, if any, shall be made solely according to the terms and conditions of the PPA, and on no other basis.

2.7 Surrender of Premises.

At termination of this Lease for any reason, LESSEE shall execute, acknowledge, and deliver to CITY, within ninety (90) days after written CITY demand, a valid and recordable quitclaim deed covering all of the premises. The premises shall be delivered free and clear of all liens and encumbrances and in a decent, safe, and sanitary condition.

If LESSEE fails or refuses to deliver the required deed, CITY may prepare and record a notice reciting LESSEE'S failure to execute this lease provision, and the notice will be conclusive evidence of the termination of this Lease and all LESSEE'S rights to the premises.

SECTION 3: PAYMENTS**3.1 Time and Place of Payment.**

Reduced electric utility costs to the CITY from the sale of renewable electricity from the SBFC PPA shall be deemed to be consideration paid by LESSEE in lieu of rents for purposes of this Lease. Payments for the purchase of electricity shall be as per the PPA.

3.2 Payment

- a. Payments. All payments for electricity delivered under this Lease shall be as provided under the terms of the PPA.
- b. During the Site Development Period of the PPA, LESSEE shall obtain all necessary permits, approvals, and licenses for the proposed project at no cost to the CITY. LESSEE shall notify CITY in writing upon receipt of all permits, licenses, and approvals and upon completion of the LESSEE Improvements. The City shall obtain the Environmental Approval prior to the site Development Period.

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c. Utility Service Fees.

Beginning on the first day after the first quarter of the Lease Year following the Commissioning Date, LESSEE shall for water supply services pay to CITY initially \$2.003 per Hundred Cubic Feet, for water provided to the LESSEE by the CITY. LESSEE shall provide at its expense a commercial quality, MWWWD approved, meter to monitor water consumption. The consumption data shall be provided quarterly. The water rate shall be reviewed annually and adjusted to match the water and sewer rate(s) paid by the CITY. Payments shall be submitted and credited against the electricity purchases made by the City on the last monthly electricity invoice for that quarter, as described in the PPA

3.3 Inspection of Records.

LESSEE agrees to make any and all records and accounts available to CITY for inspection at all reasonable times so that CITY can determine LESSEE'S compliance with this Lease and the PPA. These records and accounts may be maintained at LESSEE's offices but shall be made immediately available to CITY in San Diego. Records shall be complete and accurate showing all income and receipts from use of the premises. LESSEE'S failure to keep and maintain such records and make them available for inspection by CITY is a breach of this Lease and cause for termination. LESSEE shall maintain all such records and accounts for a minimum period of five (5) years.

LESSEE shall, at all times during the lease term, keep accurate and complete records in double entry bookkeeping form of all financial transactions made possible by business operation on the premises. The records must be supported by source documents of original entry, purchase invoices, or other pertinent documents.

CITY shall have the discretion to require the installation of any additional methods or control it may consider necessary, or to request an audit of the records and accounts.

The cost of the audit(s) will be borne by CITY unless the audit(s) reveal an overpayment discrepancy of more than five percent (5%) between the payment due, as reported by LESSEE in accordance with this Lease and the PPA, and payment due as determined by CITY audit(s). In the event of such discrepancy, the cost of the audit(s) will be borne by LESSEE, in addition to any payment due plus any additional costs incurred by CITY as defined under this Section. LESSEE'S failure to keep complete and accurate records by means of double entry bookkeeping and make them available for inspection by CITY is a breach of this Lease and cause for termination.

SECTION 4: ASSIGNMENT4.1 Time is of Essence; Provisions Binding on Successors.

Time is of the essence of all of the terms, covenants, and conditions of this Lease, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this Lease shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.

4.2 Assignment and Subletting.

LESSEE shall not assign this Lease except to the extent the PPA itself may be assigned, as provided in PPA.

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"Assignment" for the purposes of this clause shall include any transfer of any ownership interest in this Lease by LESSEE or by any partners, principals, or stockholders, as the case may be, from the original LESSEE, its general partners, or principals.

Except as provided in the PPA, approval of any assignment or sublease shall be conditioned upon the assignee or sub-lessee agreeing in writing that it will assume the rights and obligations thereby assigned or subleased and that it will keep and perform all covenants, conditions, and provisions of this agreement which are applicable to the rights acquired. Pursuant to City Charter Section 225, the CITY must review and approve every person or entity, which will have an interest in this Lease as a sub-lessee or assignee. The CITY's approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

4.3 Encumbrance.

Subject to prior consent by CITY, which shall not be unreasonably withheld, LESSEE may encumber this Lease, its leasehold estate, and its improvements thereon by deed of trust, mortgage, chattel mortgage, or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the proceeds of such loan or loans be devoted exclusively to the purpose of developing the leased premises. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the premises; on-site improvements; escrow charges; premiums for hazard insurance or other insurance or bonds required by CITY; title insurance premiums; reasonable loan costs such as discounts, interest, and commissions; and architectural, engineering, and attorneys' fees and other normal expenses incidental to such construction.

Any subsequent encumbrances on the premises or on any permanent improvements thereon must first have the approval in writing of the CITY. Such subsequent encumbrances shall also be for the exclusive purpose of development of the premises. Provided, however, after the premises are fully developed in accordance with said Development Plan to the satisfaction of the CITY, proceeds from refinancing or from such subsequent encumbrances may be used to reduce LESSEE'S equity, and further that LESSEE understands and specifically agrees that the CITY shall have the sole and absolute discretion to approve, disapprove, or condition any such proposed subsequent encumbrance, including but not limited to amending the Lease to provide then-current payments and provisions.

In the event any such approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, CITY will accept the approved mortgagee or beneficiary thereof as its new LESSEE under this Lease with all the rights, privileges, and duties granted and imposed in this Lease.

Upon prior written approval by CITY, said mortgagee or beneficiary may assign this Lease to its nominee, if nominee is a reputable, qualified, and financially responsible person or entity in the opinion of CITY. Any deed of trust, mortgage, or other security instrument shall be subject to all of the terms, covenants, and conditions of this Lease and shall not be deemed to amend or alter any of the terms, covenants, or conditions hereof. Pursuant to City Charter Section 225, the CITY must review and approve every person or entity, which will have a financial interest in this Lease. The CITY's approval will not be unreasonably withheld, provided all such persons and entities are of good character and reputation in the community.

4.4 Defaults and Remedies

a. Default. In the event that:

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1. LESSEE shall default in the performance of any covenant or condition required by this Lease to be performed by LESSEE and shall fail to cure said default within thirty (30) days following written notice thereof from CITY; or if any such default is not curable within thirty (30) days, and LESSEE shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or
2. LESSEE shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or
3. LESSEE shall be adjudicated a bankrupt; or
4. LESSEE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon LESSEE or upon any person claiming rights through LESSEE, immediately terminate this Lease and all rights of LESSEE and of all persons claiming rights through LESSEE to the premises or to possession thereof; and CITY may enter and take possession of the premises. Provided, however, in the event that any default described in Section 22 of the PPA, hereinabove is not curable within thirty (30) days after notice to LESSEE, CITY shall not terminate this Lease pursuant to the default if LESSEE immediately commences to cure the default and diligently pursues such cure to completion.

In the event there is a deed of trust or mortgage on the leasehold interest, CITY shall give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during such time as mortgagee or beneficiary pursues said cure with reasonable diligence.

- b. Remedies of Lender. Should the default(s) be noncurable by LESSEE, then any lender holding a beneficial interest in the leasehold, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of LESSEE hereunder and to commence performance of this Lease. If such mortgagee or beneficiary shall give notice in writing of its election to so substitute itself within the thirty-day period after receiving written notice by CITY of the default, and the default, if curable, is cured by such mortgagee or beneficiary, then this Lease shall not terminate pursuant to the default. In that event, CITY expressly consents to the substitution and authorizes the mortgagee or beneficiary to perform under this Lease with all the rights, privileges, and obligations of LESSEE, subject to cure of the default, if possible, by mortgagee or beneficiary. LESSEE expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.
- c. Abandonment by LESSEE. Even though LESSEE has breached the Lease and abandoned the property, this Lease shall continue in effect for so long as CITY does not terminate this Lease, and CITY may enforce all its rights and remedies hereunder, including but not limited to the right to recover payments as they become due, plus damages.
- d. Waiver. Any CITY waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the CITY in order to constitute a valid and binding waiver. CITY delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this Lease. The use of one remedy or right for any

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default does not waive the use of another remedy or right for the same default or for another or later default. CITY'S acceptance of any payments is not a waiver of any default preceding the payment. CITY and LESSEE specifically agree that the property constituting the premises is CITY-owned and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the CITY or CITY staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the CITY to take action or require the cure of any default after such default is brought to the attention of the City Council by the CITY or by any concerned citizen.

4.5 Eminent Domain.

If all or part of the premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) will be as follows:

- a. In the event the entire premises are taken, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- b. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is unsuitable for the Lease operation, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- c. In the event of a partial taking, if, in the opinion of CITY, the remaining part of the premises is suitable for continued Lease operation, this Lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken.
- d. Transfer. CITY has the right to transfer CITY'S interests in the premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any improvements placed by it on the premises in accordance with this Lease.
- e. No Inverse Condemnation. The exercise of any CITY right under this Lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.
- f. Recovery of costs. LESSEE shall reserve the right to recover its cost of improvements and any other project value from any condemnation proceeding.

4.6 Partnership Liability.

Each general partner of LESSEE shall jointly and severally perform and be responsible for each and every term, covenant, and condition, and each general partner is jointly and severally liable for performance under this Lease.

SECTION 5: INSURANCE RISKS/SECURITY5.1 Insurance.

As requested by the CITY, LESSEE shall deliver to CITY of insurance required under provisions of the PPA and shall maintain all such policies in full force, as required by the PPA.

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5.2 Indemnification.

LICENSEE shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents and employees, harmless from and against any and all claims asserted or liability established to the same extent and in the same manner as provided between the parties in the PPA.

5.3 Waste, Damage, or Destruction.

LESSEE agrees to give notice to CITY of any fire or other damage that may occur on the leased premises within twenty four (24) hours of such fire or damage. LESSEE agrees not to commit or suffer to be committed any waste or injury or any public or private nuisance, to keep the premises clean and clear of refuse and obstructions, and to dispose of all garbage, trash, and rubbish in a manner satisfactory to CITY. If the leased premises shall be damaged by any cause which puts the premises into a condition which is not decent, safe, healthy, and sanitary, LESSEE agrees to make or cause to be made full repair of said damage and to restore the premises to the condition which existed prior to said damage; or, at CITY'S option, LESSEE agrees to clear and remove from the leased premises all debris resulting from said damage and rebuild the premises in accordance with plans and specifications previously submitted to CITY and approved in writing in order to replace in kind and scope the operation which existed prior to such damage, using for either purpose the insurance proceeds as set forth in Section 5.1, Insurance, hereof.

LESSEE agrees that preliminary steps toward performing repairs, restoration, or replacement of the premises shall be commenced by LESSEE within seventy two (72) hours, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter.

SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS / OBLIGATION TO REMOVE AND REMEDIATE

6.1 Acceptance of Premises.

LESSEE represents and warrants that it has independently inspected the premises and made all tests, investigations, and observations necessary to satisfy itself of the condition of the premises, or shall perform such inspection during the Preconstruction phase of the Development Period. LESSEE agrees it is relying solely on such independent inspection, tests, investigations, and observations in making this Lease. LESSEE further acknowledges that the premises are in the condition called for by this Lease, except as otherwise provided in the PPA.

6.2 Entry and Inspection.

CITY reserves and shall always have the right, but not the obligation, to enter said premises for the purpose of viewing and ascertaining the condition of the same, or to protect its interests in the premises, or to inspect the operations conducted thereon. In the event that such entry or inspection by CITY discloses that said premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to

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correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Lease imposed on CITY.

6.3 Maintenance.

Except as hereinafter provided, LESSEE agrees to assume full responsibility and cost for the operation and maintenance of the premises throughout the term. LESSEE will perform all such repairs and replacements necessary to maintain and preserve the premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all applicable laws. All applicable codes and standards of CITY, state, and federal agencies shall be observed in all maintenance, repairs, and replacements on the premises.

6.4 Improvements/Alterations.

No improvements, structures, or installations shall be constructed on, in, around, or under the premises, and may not be altered by LESSEE except as authorized in the PPA.

6.5 Utilities.

LESSEE agrees to order, obtain, and pay for all natural gas, electric, water and communication utilities and service and installation charges in connection with the development and operation of the leased premises. All utilities will be installed underground. The CITY shall grant to LESSEE appurtenant easements for such utilities, provided that LESSEE's facility design is to be developed under the PPA and reasonably requires grants of such right(s) of way, and provided further that such designed utility locations are acceptable to the CITY and do not unreasonably interfere with the CITY's operations or plant uses.

6.6 Liens.

LESSEE shall at all times save CITY free and harmless and indemnify CITY against all claims for labor or materials in connection with operations, improvements, alterations or repairs on or to the premises and the costs of defending against such claims, including reasonable attorney's fees.

If improvements, alterations or repairs are made to the premises by LESSEE or by any party other than CITY, and a lien or notice of lien is filed, LESSEE shall within five (5) days of such filing either:

- a. Take all actions necessary to record a valid release of lien, or
- b. File with CITY a bond, cash or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

6.7 Taxes.

LESSEE agrees to pay, before delinquency, all taxes, assessments, and fees assessed or levied upon LESSEE or the premises, land, and any buildings, structures, machines, equipment, appliances or other improvements or property of any nature whatsoever erected, installed, or maintained by LESSEE or levied by reason of the business or other LESSEE activities related to the leased premises, including any licenses or permits. LESSEE recognizes and agrees that this Lease may create a possessory interest subject to property taxation, and that LESSEE may be subject to the payment of taxes levied on such interest, and that LESSEE shall pay all such

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possessory interest taxes, provided however, that CITY shall reimburse LESSEE for any taxes on the land itself that are exclusive of the improvements thereon. In the event that CITY is to reimburse LESSEE for taxes on the land, such reimbursement shall be effected through a substantiated charge on the next ensuing invoice for electricity under the PPA

6.8 Signs.

LESSEE agrees not to erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without the prior written consent of CITY. If any such unauthorized item is found on the premises, LESSEE agrees to remove the item at its expense within 24 hours notice thereof by CITY or CITY may thereupon remove the item at LESSEE'S cost.

6.9 Ownership of Improvements and Personal Property.

- a. Any and all improvements, excluding LESSEE owned improvements as further defined in the PPA including structures, and installations or additions to the premises now existing or constructed on the premises by LESSEE shall at Lease expiration or termination be deemed, with City's consent and acceptance, to be part of the premises and shall become, at LESSEE option, CITY'S property free of all liens and claims, except as otherwise provided in this Lease.
- b. CITY shall notify LESSEE thirty (30) days prior to termination or one hundred eighty (180) days prior to expiration, and LESSEE shall remove all improvements, structures and installations as required by Section 6.13 hereunder and subject to Section 22.2.3 of the PPA at LESSEE'S sole cost on or before the ninth day after Lease expiration or termination. If LESSEE fails to remove any above or below ground improvements, structures, and installations as directed, subject to Section 22.2.3 of the PPA, LESSEE agrees to pay CITY the full cost of any removal.
- c. LESSEE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property shall be removed by LESSEE by the date of the expiration or termination of this Lease. Any said items, which LESSEE fails to remove, will be considered abandoned and become CITY'S property free of all claims and liens, or CITY may, at its option, remove said items at LESSEE'S expense.
- d. If any removal of such personal property by LESSEE results in damage to the remaining improvements on the premises, LESSEE agrees to repair all such damage.
- e. Notwithstanding any of the foregoing, in the event LESSEE desires to dispose of any of its personal property used in the operation of said premises upon expiration or termination of this Lease, then CITY shall have the first right to acquire or purchase said personal property.

6.10 Unavoidable Delay.

If the performance of any act required of CITY or LESSEE is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay unless otherwise provided in this Lease or the PPA. Provided, however, this provision shall not apply to obligations to make payments as required pursuant to this Lease. In the event LESSEE or CITY claims the existence of such a delay, the

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party claiming the delay shall notify the other party in writing of such fact within ten (10) days after the beginning of any such claimed delay.

6.11 Lessee Improvements.

LESSEE plans to improve the leased premises with the construction and installation of an Energy System in accordance with approvals by the CITY and receipt of all applicable governing Permits as described in the PPA. The CITY or its designee shall have the authority to authorize changes to the PPA provided that the basic concept may not be modified without City Council approval and a document evidencing any approved changes shall be filed in the Office of the City Clerk. Failure by LESSEE to comply with the requirements of the PPA shall constitute a major default and subject this Lease to termination by CITY. The CITY, in its sole discretion, may approve an extension to the Construction Commencement Deadline or Commissioning Date listed in the PPA of up to six (6) months without further City Council approval. In the event the City exercises such extension to the Commissioning Date, the ten (10) Lease Year operating period will also be extended a corresponding period of time.

6.12 Hazardous/Toxic Waste.

LESSEE will not allow release of hazardous substances in, on, under, or from the premises. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the Office of the City Clerk as Document 769704 and by this reference is incorporated herein.

In the event of any release of a hazardous substance caused by LESSEE, LESSEE shall be responsible for all costs of remediation and removal of such substances in accordance with all applicable rules and regulations of governmental authorities.

LESSEE agrees to assume the defense of, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to Environmental Liabilities resulting from LESSEE'S operations on the premises, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

If LESSEE knows or has reasonable cause to believe that any hazardous substance has been released on or beneath the premises, LESSEE shall give written notice to the CITY within ten (10) days of receipt of such knowledge or cause for belief. Provided, however, if LESSEE knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, LESSEE shall notify the CITY immediately upon receipt of this knowledge or belief and shall take all actions necessary to alleviate such danger. LESSEE will notify the CITY immediately of any notice of violation received or initiation of environmental actions or private suits relative to the premises. In addition, LESSEE and LESSEE'S sub-lessees shall not utilize or sell any hazardous substance on the property without the prior written consent of CITY.

At any time within the twelve (12) months before the expiration or earlier termination of this Lease, LESSEE, at CITY'S sole option, shall cause an environmental assessment of the premises to be completed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist or Registered Civil Engineer. Said environmental assessment shall be obtained at the sole cost and expense of

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LESSEE and shall establish what, if any, hazardous substances exist on, in or under the premises, and in what quantities and from what origins. If any additional hazardous substances exist in quantities greater than that allowed by the CITY, county, state or federal laws, statutes, ordinances, or regulations, then said environmental assessment shall include a discussion of these substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes and estimates of the cost of such remediation or removal. LESSEE shall cause the remediation and/or removal of the hazardous substances caused by its operations recommended in the environmental assessment such that compliance with environmental law is achieved and shall be solely responsible for all costs and expenses incurred for the remediation and /or removal of hazardous substances caused by its operations.

Notwithstanding anything to the contrary in this Lease, the City and LESSEE acknowledge and agree that LESSEE's responsibilities with respect to the presence of any hazardous substance disposed of or otherwise placed on or beneath the Premises, or incorporated or migrating into or beneath the Premises, shall be limited to those arising from conditions caused by LESSEE's action or inaction during the term of this Lease, or by actions or inactions of third parties hired, contracted, or otherwise controlled by LESSEE, and in no event shall LESSEE be responsible for the action or inaction of the CITY, other lessees or third parties under control of the City with respect to such conditions.

To the best of the CITY's knowledge, the City represents that the surrounding areas have not been used for the storage, manufacture or disposal of any hazardous substance, hazardous waste, pollutants or contaminants, as such terms are used and defined by federal, state or local environmental laws, rules, regulations or ordinances, and there are no proceedings pending or, to the best of the CITY's knowledge, threatened, in which such storage, manufacture or disposal is alleged. The CITY further represents that to the best of its knowledge, there have been no spills or releases into the air, soil, groundwater or surface waters emanating from a source located on the Premises whether such source was controlled by the CITY, a prior owner of the Premises or an occupant of the Premises and that there are no underground storage tanks located on the Premises which contain or have in the past contained hazardous materials including but not limited to petroleum products.

LESSEE shall have the right to investigate and confirm the representations made in this Section by the City according to the best of the City's knowledge. LESSEE shall have the right to terminate this Lease prior to the expiration of the Site Development Period because of the discovery of Pollutants or Hazardous Materials at or in the Leased Premises which were not generated or release by LESSEE. In the event that LESSEE's investigations during the Site Development Period reveal the presence of Pollutants or Hazardous Materials for which the City is responsible under this section, LESSEE may, as an alternative to terminating the PPA and this Lease without liability, propose to the City that the City perform timely remediation of the site of the Pollutants or Hazardous Materials at the City's sole expense, and the City shall, in good faith, evaluate the proposal and determine whether it has a duty to proceed immediately with remediation and whether the estimated expense of the remediation warrants acceptance of the proposal. In the event that the City determines that it has no legal duty to perform the remediation and the costs of such remediation outweigh benefits to the City, the City may decline LESSEE's proposal and LESSEE shall have the right to immediately terminate this Lease without liability.

The City agrees to assume the defense of, indemnify, and hold LESSEE, its offices, agents, employees, directors, and shareholders harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from the CITY's or other party's operations on the premises prior to commencement of the Lease or adjacent operations, including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.

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6.13 Obligation to Remove and Remediate

- 6.13.1 Upon expiration or termination of this Agreement for whatever reason, LESSEE shall remove the Energy System, other than subsurface structures, from the Energy System Site and return such site to a clean and graded condition and in good repair, normal wear and tear expected.
- 6.13.2 Subject to Section 22.2.3 of the PPA, LESSEE shall remove the Energy System and all other of LESSEE's property and equipment without undo damage to the Facility within one hundred eighty (180) days after the expiration of the term of this Agreement, within ninety (90) days after the date of the Notice of termination by CITY or LESSEE or within thirty (30) days of the Notice from CITY of election to terminate pursuant to Section 22.2.1 of the PPA. Subject to Section 22.2.3 of the PPA, LESSEE shall repair any damage to the Energy System Site or the Facility caused in the removal of the Energy System.
- 6.13.3 Subject to Section 22.2.3 of the PPA, in the event that the portion of the Energy system Site is not returned to the CITY in the condition required under Section 6.13.1, CITY may restore such site as described in Section 6.13.1, and LESSEE shall be liable to and shall reimburse CITY for any such reasonable expenditures made, plus interest equal to the then-maximum rate as established in California State Law, per annum from the date of completion of work.

SECTION 7: GENERAL PROVISIONS**7.1 Notices.**

- a. Any notice required or permitted to be given hereunder shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to LESSEE at the leased premises or at such other address designated in writing by LESSEE; and to the CITY as follows:

CITY:
 Attention: Metropolitan Wastewater Department
 City Administration Building
 202 "C" Street, M.S. 51A
 San Diego, CA 92101-4155

LESSEE:

Attention: Linde, Inc.
 575 Mountain Avenue
 Murray Hill, NJ 07974

Attn: Mr. Steven Eckhardt

And to:

The LINDE Group, Inc.
 575 Mountain Avenue
 Murray Hill, NJ 07974
 Facsimile Number (908) 771-4803
 Attention: General Counsel

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or to any mortgagee, trustee, or beneficiary, as applicable, at such appropriate address designated in writing by the respective party.

- b. Any party entitled or required to receive notice under this Lease may by like notice designate a different address to which notices shall be sent.

7.2 Compliance with Law.

LESSEE shall at all times in the construction, maintenance, occupancy, and operation of the premises comply with all applicable laws, statutes, ordinances, and regulations of CITY, county, state, and federal governments at LESSEE'S sole cost and expense. In addition, LESSEE shall comply with any and all notices issued by the City Mayor or his authorized representative under the authority of any such law, statute, ordinance, or regulation.

7.3 CITY Approval.

The approval or consent of CITY, wherever required in this Lease, shall mean the written approval or consent of the City Mayor or his representative unless otherwise specified, without need for further resolution by the City Council.

7.4 CITY Approval or Notice.

The approval or consent of CITY or notice to CITY, wherever required in this Lease, shall mean the written approval or consent of, or notice to, the City Mayor or his authorized representative unless otherwise specified, without need for further resolution by the City Council. "Authorized representative" shall mean the Director of the Real Estate Assets Department or any other individual designated by the CITY in written notice to LESSEE.

7.5 Nondiscrimination.

LESSEE agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status or physical disability in LESSEE'S use of the premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.

7.6 Compliance with CITY'S Equal Opportunity Contracting Program.

- a. Equal Opportunity Contracting. LESSEE acknowledges and agrees that it is aware of, and will comply with, the CITY's Equal Opportunity Contracting program as defined in the PPA.
- b. Local Business and Employment. LESSEE acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. LESSEE will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Lease agreement from local residents and firms as opportunities occur. LESSEE agrees to hire qualified local residents and firms whenever feasible.
- c. Failure to Comply. LESSEE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may

LINDE / CITY

result in termination of the PPA, this Lease agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

7.7 Partial Invalidity.

If any term, covenant, condition, or provision of this Lease is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.

7.8 Legal Fees.

In the event of any litigation regarding this Lease, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorneys' fees.

7.9 Number and Gender.

Words of any gender used in this Lease shall include any other gender, and words in the singular number shall include the plural, when the tense requires.

7.10 Captions.

The Lease Outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Lease. The numbers of the paragraphs and pages of this Lease may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this Lease.

7.11 Entire Understanding.

This Lease, the PPA and its Exhibits, contains the entire understanding of the parties with regards to the installation, operation, maintenance of the Energy System and the sale of electricity to the CITY. LESSEE, by signing these documents, agrees that there is no other written or oral understanding between the parties with respect to the leased premises. Each party has relied on its own examination of the premises, advice from its own attorneys, and the warranties, representations, and covenants of the documents themselves. Each of the parties in this Lease agrees that no other party, agent, or attorney of any other party has made any promise, representation or warranty whatsoever which is not contained in this Lease.

The failure or refusal of any party to read the Lease or other documents, inspect the premises, and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this Lease will be valid unless it is in writing and signed by all parties.

7.12 CITY Employee Participation Policy.

It is the policy of CITY that all CITY contracts, agreements, or leases with consultants, vendors, or LESSEES shall include a condition that the contract, agreement or Lease may, at the sole option of CITY, be unilaterally and immediately terminated by the CITY if LESSEE knowingly employs an individual who, within the twelve months immediately preceding such employment, did in his/her capacity as a CITY officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the selection of the LESSEE. It is not the intent of this policy that these provisions apply to members of the City Council.

7.13 Drug-free Workplace.

LINDE / CITY

LESSEE shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the leasehold and specifying the actions that will be taken against employees for violations of the prohibition.
- b. Establishing a drug-free awareness program to inform employees about all of the following:
 1. The dangers of drug abuse in the workplace.
 2. The LESSEE'S policy of maintaining a drug-free workplace.
 3. Any available drug counseling rehabilitation, and employees assistance programs
 4. The penalties that may be imposed upon employees' for drug abuse violations.
- c. LESSEE shall include in each sublease agreement language, which indicates the sublessee's agreement to abide by the provisions of a drug-free workplace. LESSEE and sublessees shall be individually responsible for their own drug-free workplace programs.

7.14 Disabled Access Compliance.

LESSEE agrees to comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. LESSEE'S compliance shall include but not necessarily be limited to the following:

- a. LESSEE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs or activities of LESSEE.
- c. LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
- d. Where required by law, LESSEE shall comply with CITY'S disabled access requirements by bringing up to code and making accessible any areas of the premises, which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of LESSEE.
- e. LESSEE shall include language in each sublease agreement, which indicates the sublessee's agreement to abide by the foregoing provisions. LESSEE and sublessee's shall be individually responsible for their own ADA employment programs.

LINDE / CITY

- f. LESSEE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Lease.

SECTION 8: SPECIAL PROVISIONS**8.1 Corporate Authority.**

Each individual executing this Lease on behalf of LESSEE represents and warrants that he/she is duly authorized to execute and deliver this Lease on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this Lease is binding upon the corporation in accordance with its terms, and that LESSEE is a duly qualified corporation and all steps have been taken prior to the date hereof to qualify LESSEE to do business in the state where the premises are situated.

8.2 Planting Strips.

LESSEE shall, at its sole cost, maintain the leased premises including weed abatement and planting landscaping for erosion prevention if required and fire prevention.

8.3 Standard of Employees.

LESSEE and its employees shall at all times conduct themselves and the operations on the leased premises in a creditable, social, and temperate manner. CITY shall have the right to demand that LESSEE permanently remove intemperate personnel from the leased premises upon good cause.

8.4 Relocation Payments.

LESSEE understands and agrees that it shall not be entitled to any relocation payment whatsoever upon termination of this Lease.

8.5 Relocation of Leased Site(s).

Within the terms of this Lease, the CITY may direct LESSEE to relocate to another plant site location on the SBWRP site at the CITY's expense, including lost revenues or cost of natural gas. CITY shall give LESSEE one year written notice. LESSEE will have six (6) months to begin the relocation site work and an additional six (6) months to complete the move with extensions possible for permitting and approval processes.

SECTION 9: SAN DIEGO'S FORM OF GOVERNANCE**9.1 San Diego's Strong Mayor Form of Governance.**

The CITY began operating under a mayor-council form of governance on January 1, 2006 (commonly referred to as 'strong mayor') pursuant to article XV of the City of San Diego City Charter. All references to "CITY" in this Lease and any subsequent amendments to this Lease shall be deemed to refer to "Mayor". This provision shall remain in effect for the period of time that CITY operates under the mayor-council form of governance.

LINDE / CITY

SECTION 10: SIGNATURES**10.1 Signature Page.**

IN WITNESS WHEREOF, this Lease agreement is executed by CITY, acting by and through its MAYOR,
and by LESSEE, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO

Date _____

By _____

Jerry Sanders, Mayor

LINDE MERCHANT PRODUCTION INC.: a Delaware
Corporation

Date _____

By _____

Title

APPROVED as to form and legality this _____ day of _____, 20__.

MICHAEL AGUIRRE, CITY ATTORNEY

By _____

LINDE / CITY
Exhibit A.1

Leased Premises A: Exclusive lease area provided for the Energy System Facility location.

LEASE PREMISE 'A'

"SOUTH BAY WATER RECLAMATION PLANT - FUEL CELL"

That portion of the South Bay Water Reclamation Plant in the City of San Diego, County of San Diego, State of California, as follows:

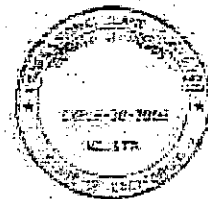
Commencing at the City of San Diego horizontal Control Station GPS 1450, having a coordinate value of North 1761140.73 East 6511364.44 based on the North American Datum of 1983 (NAD 83, Epoch 91.35), as shown on Record of Survey No. 14452, filed in the office of the County Recorder of the above said San Diego County on 3/31/1994; thence South 1°25'05" East 43391.6 feet to City of San Diego horizontal Control Station GPS 1451, having a coordinate value of North 1778802.95 East 6511355.61, as shown on above said Record of Survey No. 14452; thence South 82°59'17" West 1703.44 feet to the Point of Beginning; thence South 89°55'15" West 24.95 feet to the beginning of a curve, concave Northeasterly, having a radius of 25.00 feet; thence Northwesterly along the arc 39.32 feet through a central angle of 90°07'07"; thence North 0°00'02" West 68.33 feet to the beginning of a curve, concave Southeasterly, having a radius of 25.00 feet; thence Northeasterly along the arc 39.10 feet through a central angle of 90°36'50"; thence North 89°35'46" East 25.17 feet to a point which bears South 22°06'10" West 4782.88 feet from said horizontal Control Station GPS 1450; thence South 0°00'02" East 118.44 feet to the point of beginning.

Reserving access for ingress and egress to maintain, repair, replace any utility within the lease described above.

Above described lease parcel of land contains 5649.46 Square Feet, 0.1297 Acres.

Exhibit B-1 attached and by this reference made a part hereof.

Ronald J. Doherty, P.L.S. No. 5774
Senior Land Surveyor, Field Engineering
City of San Diego
My Registration Expires 6/30/2006



LINDE / CITY

Exhibit A-2 Leased Premises B: Exclusive lease area provided for truck unloading, staging and fuel storage.

LEASE PREMISE 'B'

"SOUTH BAY WATER RECLAMATION PLANT - FUEL CELL"

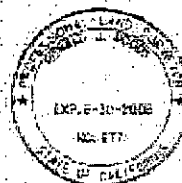
That portion of the South Bay Water Reclamation Plant in the City of San Diego, County of San Diego, State of California, as follows:

Commencing at the City of San Diego horizontal Control Station GPS 1450, having a coordinate value of North 1783140.78 East 6311364.44 based on the North American Datum of 1983 (NAD 83, Epoch 91.33), as shown on Record of Survey No. 14492, filed in the office of the County Recorder of the above said San Diego County on 3/31/1994; thence South 1°25'26" East 4539.16 feet to City of San Diego horizontal Control Station GPS 1452, having a coordinate value of North 1778802.96 East 6311356.61, as shown on above said Record of Survey No. 14492; thence South 81°53'42" West 1949.72 feet to the Point of Beginning; thence South 38°43'45" West 62.78 feet; thence North 89°57'25" West 62.00; thence North 00°02'35" East 135.00 feet to a point which bears South 25°31'48" West 4998.80 feet from said horizontal Control Station GPS 1450; thence South 89°57'25" East 25.79 feet to the beginning of a curve, concave Southwesterly, having a radius of 65.60 feet; thence Southeasterly along the arc 44.35 feet through a central angle of 38°43'14" to an intersection with a cusp to which a radial bears North 38°46'49" East; thence South 51°56'30" West 9.97 feet; thence South 38°43'47" East 13.14 feet; thence North 51°56'30" East 11.51 to an intersection with a cusp, being the beginning of a curve, concave Southwesterly, to which a radial bears North 50°21'19" East, having a radius of 65.60 feet; thence Northeasterly along the arc 33.51 feet through a central angle of 29°16'04"; thence South 10°31'37" East 11.09 feet to the beginning of a curve, concave Northeasterly, having a radius of 56.70 feet; thence Southeasterly along the arc 44.87 feet through a central angle of 43°05'26" to the point of beginning.

Reserving access for ingress and egress to maintain, repair, replace any utility within the lease described above.

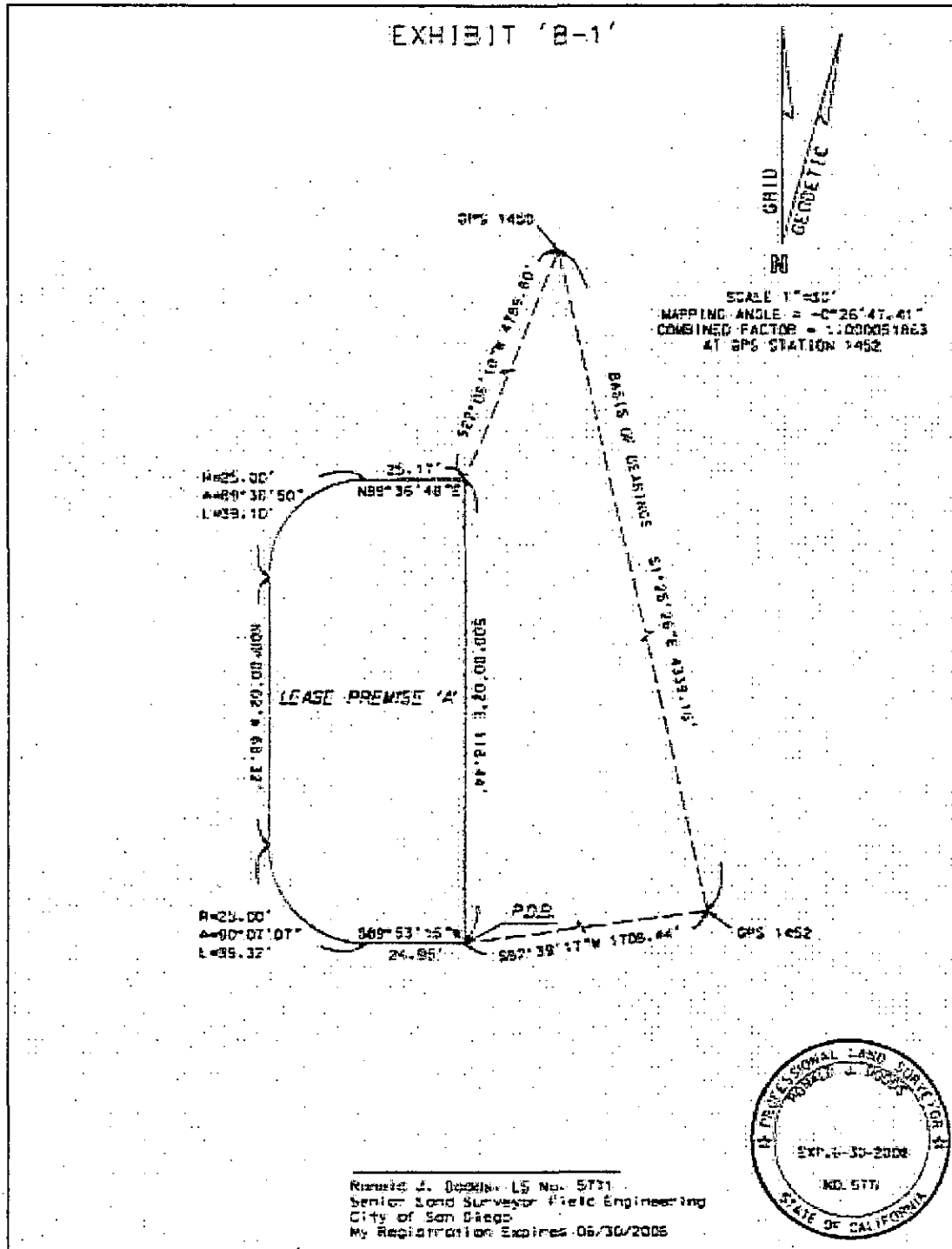
Above described lease parcel of land contains 11647.33 Square Feet, 0.2674 Acres.
Exhibit "B-2" attached and by this reference made a part hereof.

Ronald J. Dodd, P.L.S. No. 5771
Senior Land Surveyor, Field Engineering
City of San Diego
My Registration Expires 6/30/2008



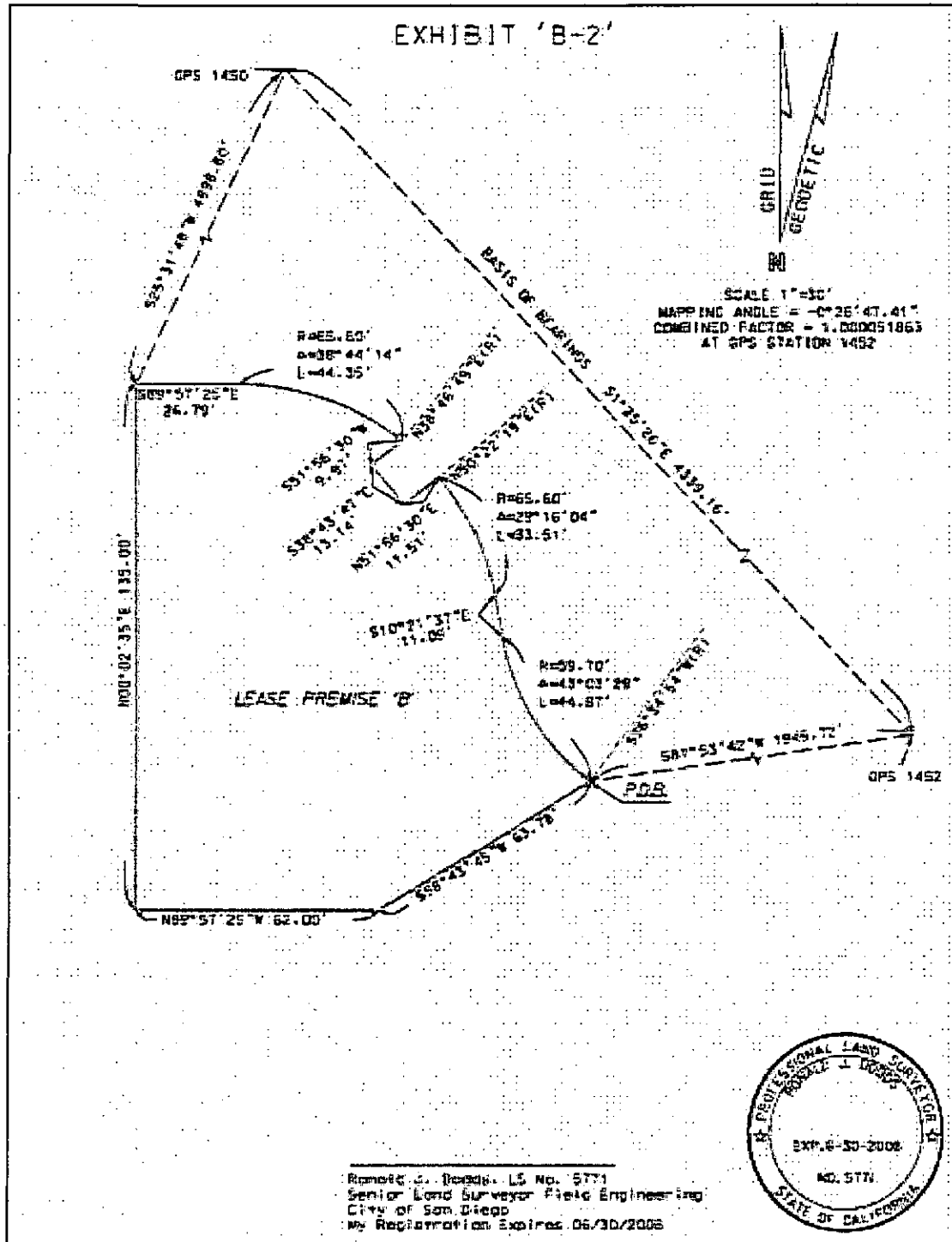
LINDE / CITY

Exhibit B-1: Parcel Map



LINDE / CITY

Exhibit B-2: Parcel Map



LINDE / CITY

Exhibit C: Corporate Name

LINDE MERCHANT PERDUCTION, INC.
CORPORATE NAME

I, Robert Wowk, certify that I am the Chief Financial Officer of the corporation named in the attached agreement; that Stanley P. Borowiec, who signed this agreement on behalf of the corporation, was then Vice President of said corporation; that said agreement was duly signed for and on behalf of said corporation by authority of its governing body, pursuant to authority granted by its board of directors, and is within the scope of its corporate powers; and that set out below are the names of the officers and directors of said corporation.

By _____

CORPORATE SEAL

Name Patrick F. Murphy - CEO & President
Title

Name Robert Wowk - CFO
Title

Name John J. Brull - Vice President
Title

Name Stanley P. Borowiec - Vice President
Title

LINDE / CITY

Exhibit D: Schedule of Applicable Rates

The following documents are used to determine the applicable rates which apply to this Lease:
Electricity bought or sold: South Bay Fuel Cell Power Purchase Agreement
Water bought or sold: Water & Wastewater Billing statement, Account number U19-15342-01-6
FOR, 2411 Dairy Mart Rd.

LINDE / CITY

Exhibit E: Schedule of Days and Hours of Operation

During the normal course of operations, the expected manning schedule and days and hours of operations are as follows:

Plant Operations: Monday through Sunday, 24 hours per day, with remote monitoring from Linde/BOC's Remote Operations Center.

Plant Staff Operations: Monday through Friday, 7am to 4pm.

Distribution Operations: Monday through Sunday, 6am to 10pm, 6 truck movements per day during that period (in and out).

Support Operations (maintenance, deliveries, etc.): Monday through Friday, 7am to 4pm.

Staff may be on site other than the previously listed hours as required to meet emergency and operational commitments.

Truck routing and travel hours may be adjusted as needed to comply with the Community's issues.

All hours are for reference only and will be adjusted as required by the MOU.

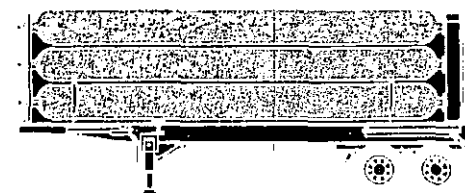
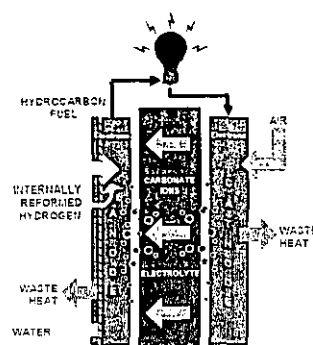
To conserve paper, please refer to the PPA that
companies this Lease.



Renewable Energy Fuel Cell Project

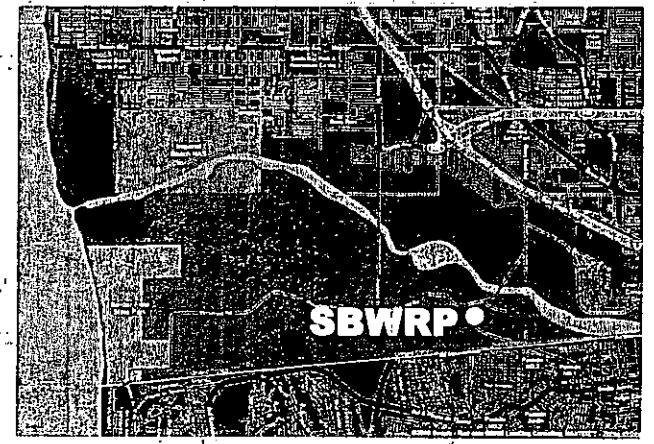
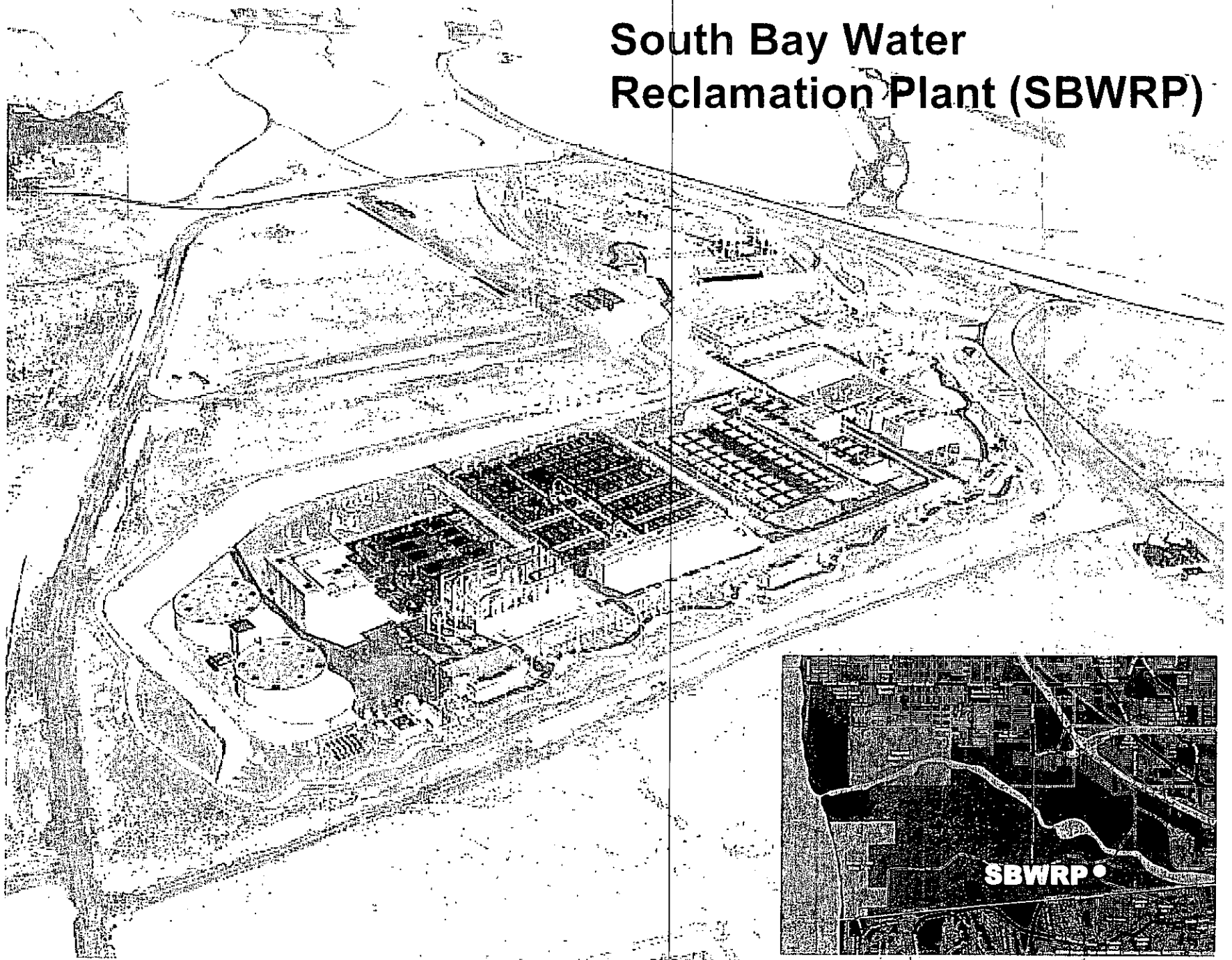
for the

South Bay Water Reclamation Plant

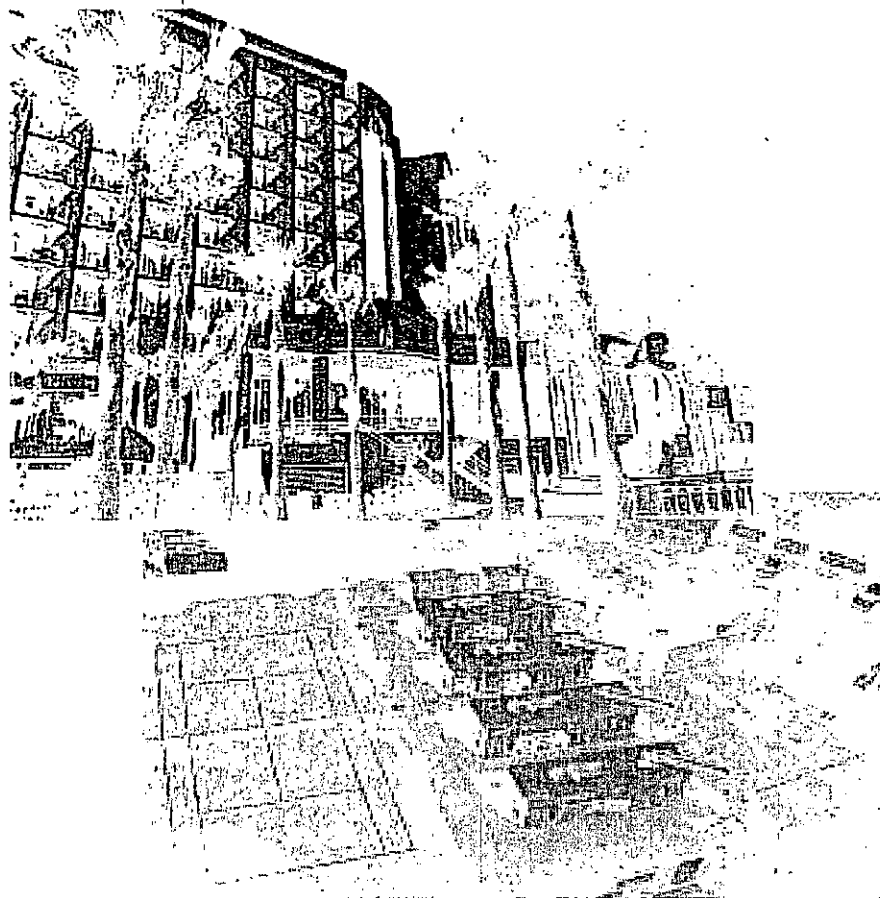


South Bay Water Reclamation Plant (SBWRP)

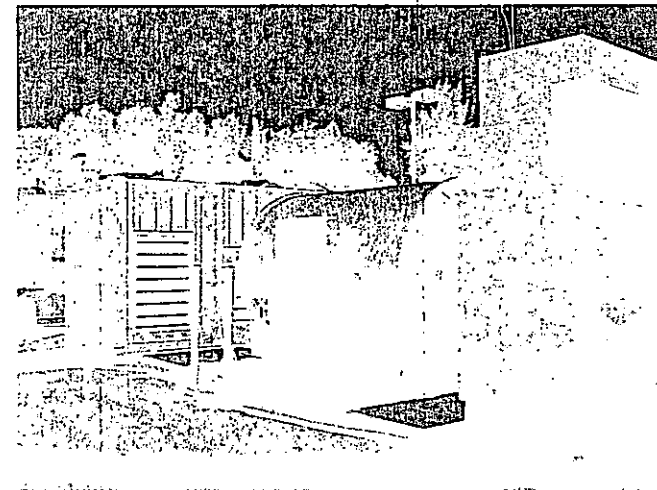
000234



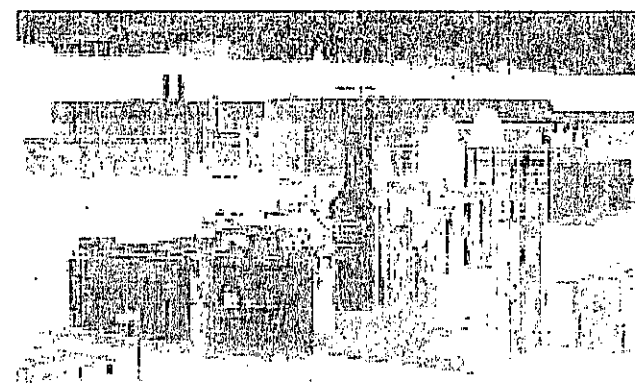
Recent Installations



Sheraton San Diego (Alliance)



Camp Pendleton (Logan)

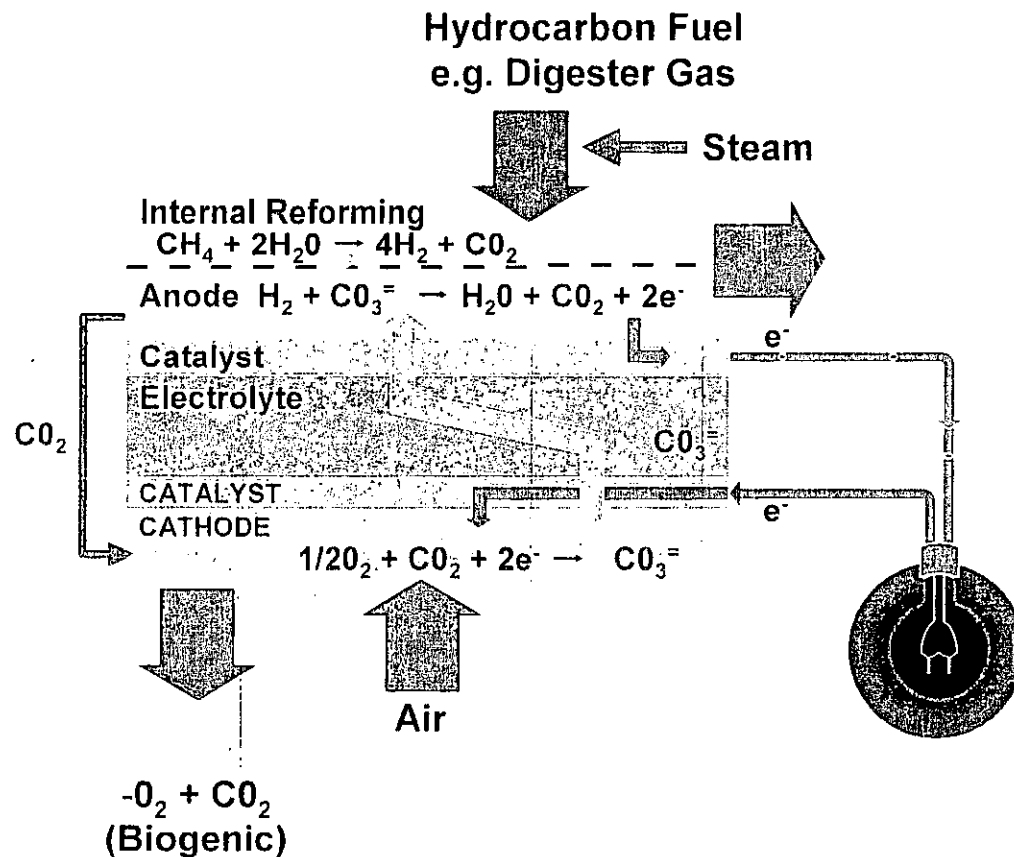


King County (EPA)

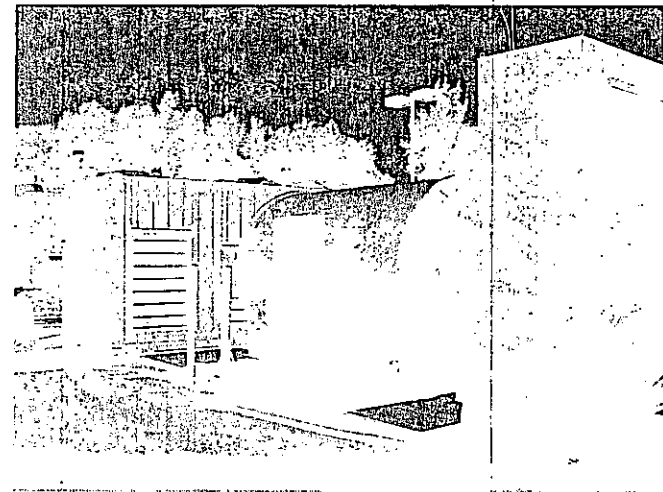
Fuel Cell Technology

Fuel Cell Energy

High Temperature Internal Reforming
Direct FuelCell®



- High efficiency – 47%
- Negligible NO_x and CO
- Recycles CO_2
- Unattended reliable operations



Camp Pendleton (Logan)

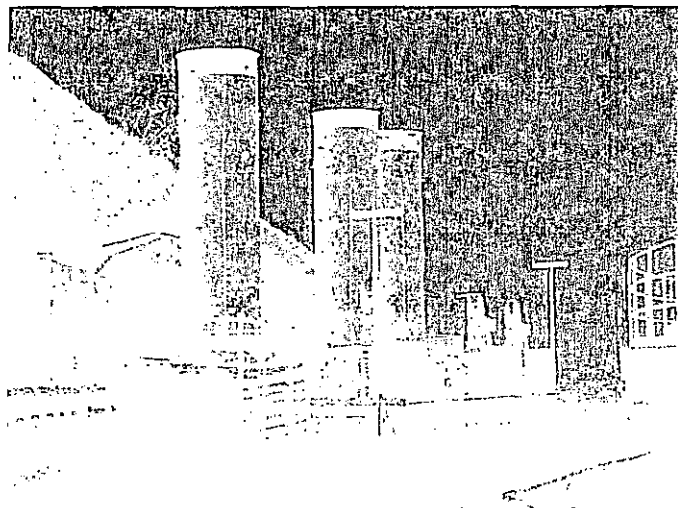
Emissions Benefits Comparison

Based on average 270 Therms/hour consumption

Flares:

15 lbs/hr of NO_x

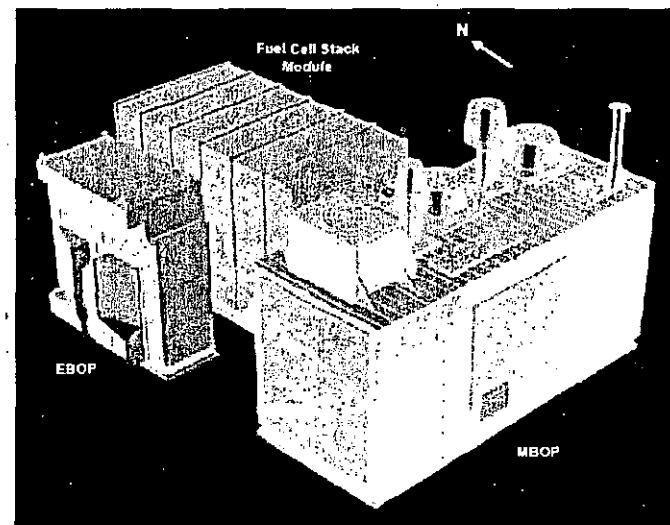
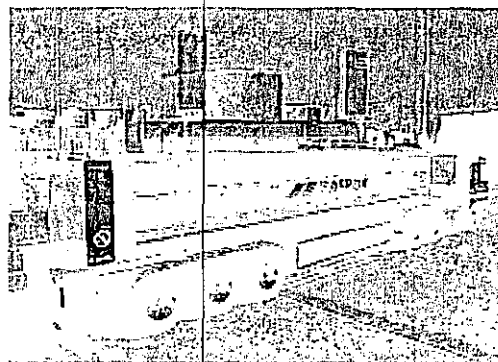
20 lbs/hr of CO



*64 Tons of NO_x
85 Tons of CO
per year avoided*

*97%
Reduction
In both
 NO_x and CO*

*7000 Tons
Reduction of
Non-Biogenic
 CO_2*



Fuel Cell:

0.46 lbs/hr of NO_x

0.3 lbs/hr of CO

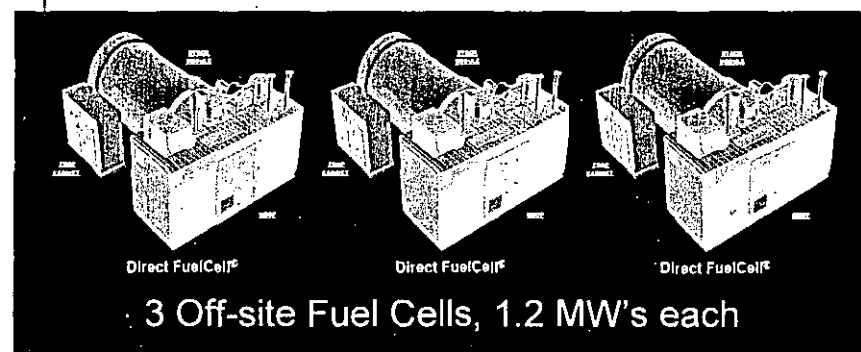
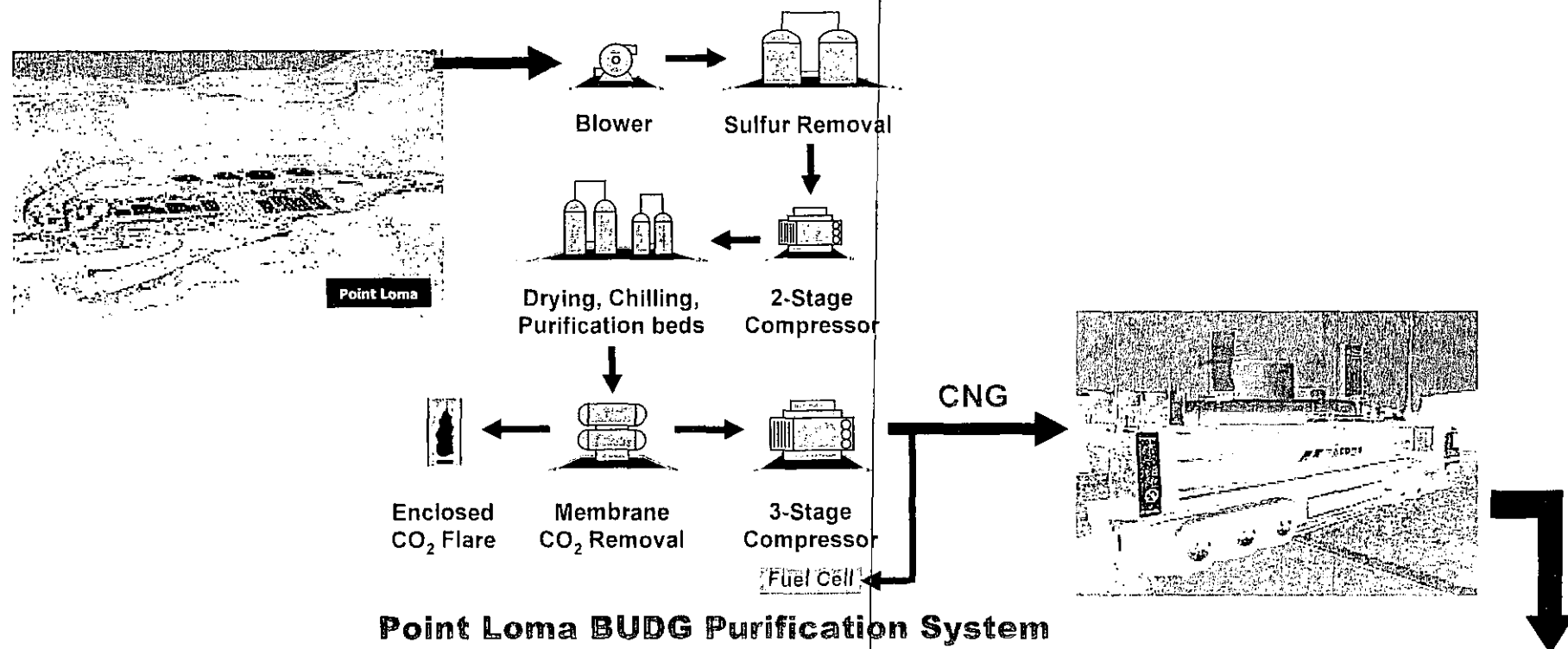
Trucks:

0.04 lbs/hr of NO_x

0.33 lbs/hr of CO

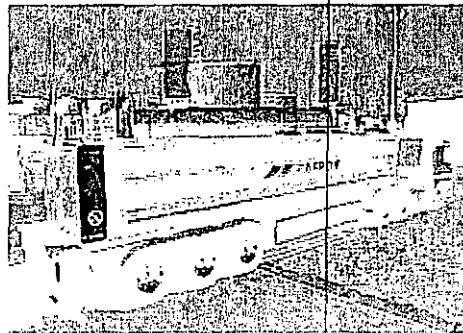
BUDG

BOC/Linde System Diagram



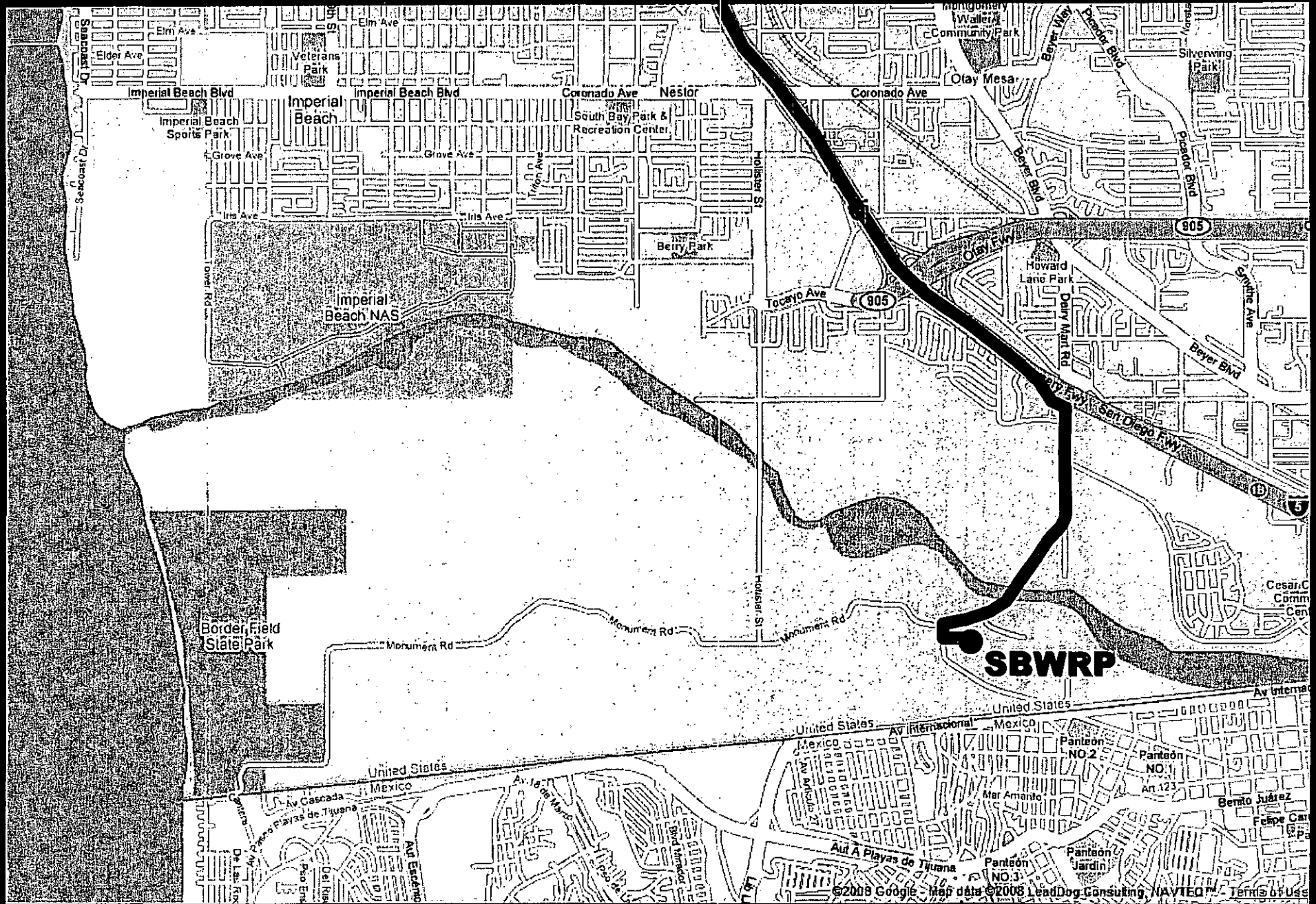
Tube Trailers & Safety

- Tube trailers are specially designed heavy-walled gas storage tubes (cylinders) for the transport of gaseous products over the road
- To date, there have been no known reports of leaks or fires from tube trailers
- Tube trailers are used to transport products such as Helium, Hydrogen, Oxygen, Nitrogen and Methane (natural gas or digester gas)

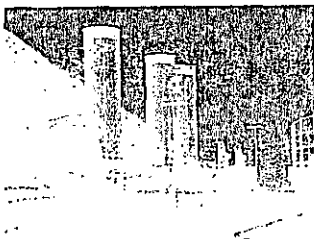


BOC has been awarded the Compressed Gas Association's Large Fleet Award for the SAFEST DISTRIBUTION FLEET for 7 out of the last 11 years!

Proposed Routes for Gas Delivery to SBWRP



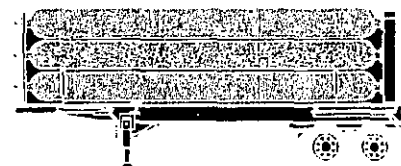
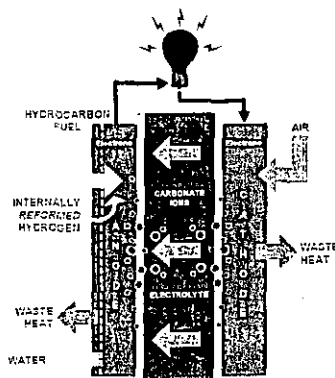
000260



Summary



- Clean Renewable Energy
- Saves City \$75,000/yr
- This innovative concept to transport available renewable digester gas from the PLWTP to this ultra clean SBWRP fuel cell will provide MWWWD energy budget , the region's , and these



REQUEST FOR COUNCIL ACTION

CITY OF SAN DIEGO

1. CERTIFICATE NUMBER
(FOR AUDITOR'S USE ONLY)52
3/11

TO: CITY ATTORNEY	2. FROM (ORIGINATING DEPARTMENT): METROPOLITAN WASTEWATER DEPARTMENT	February 4, 2008
----------------------	---	------------------

4. SUBJECT: Renewable Energy Fuel Cell Power Purchase Agreement with Linde Merchant Production, Inc.		
5. PRIMARY CONTACT (NAME, PHONE, & MAIL STA.) Tom Alspaugh, 858-654-4493, MS 901A	6. SECONDARY CONTACT (NAME, PHONE, & MAIL STA.) Teresa DiPrima, 858-292-6333, MS 901A	7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED <input type="checkbox"/>

8. COMPLETE FOR ACCOUNTING PURPOSES

FUND					9. ADDITIONAL INFORMATION / ESTIMATED COST:
DEPT.					Projected Energy Savings
ORGANIZATION					FY09 \$37,500 FY17 \$75,000
CBJECT ACCOUNT					FY10 \$75,000 FY18 \$75,000
JOB ORDER					FY11 \$75,000 FY19 \$37,500
C.I.P. NUMBER					FY12 \$75,000
					FY13 \$75,000
					FY14 \$75,000
					FY15 \$75,000
AMOUNT	No Cost				FY16 \$75,000

10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIG. DEPT.	<i>[Signature]</i>	2/6/08	8	ORIG. DEPT.	<i>[Signature]</i>	2/19/08
2	E.O.C.	<i>[Signature]</i>	2/15/08	9	ENERGY DIV.	<i>[Signature]</i>	
3	E.A.S.	<i>[Signature]</i>	2/14/08				
4	F.M. Dm B6	<i>[Signature]</i>	2/12/08				
5	AUDITOR L. Chan	<i>[Signature]</i>	2/21/08				
6	DIR. OF PUBL. UTIL.	<i>[Signature]</i>	2/22/08				
7	CITY ATTORNEY	<i>[Signature]</i>	2/26/08				

DOCKET COORD: _____ COUNCIL LIAISON: _____

COUNCIL PRESIDENT ☒ SPOB ☒ CONSENT ☐ ADOPTION

REFER TO: _____ COUNCIL DATE: 3/11/08

11. PREPARATION OF: ☐ RESOLUTIONS ☒ ORDINANCE(S) ☒ AGREEMENT(S) ☐ DEED(S)

1. Authorizing the Mayor, or his designee, to enter into the Power Purchase Agreement for Renewable Biogas Fueled On-Site Power Generation By and Between the City of San Diego and Linde Merchant Production Inc. for an initial term of 10 years for 1.2MW of renewable electricity at the South Bay Water Reclamation Plant.

2. Enter into the South Bay Water Reclamation Plant Fuel Cell Site Lease for approximately 19,450 square feet of land area at the Metropolitan Wastewater Department's (MWW) South Bay Water Reclamation Plant.

11A. STAFF RECOMMENDATIONS:

Adopt the Ordinances

12. SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION.)

COUNCIL DISTRICT(S): 8

COMMUNITY AREA(S): San Ysidro Planning and Development Group

ENVIRONMENTAL IMPACT: This project is exempt from CEQA pursuant to State CEQA Guidelines Section 15060(a)(3); 15301; & 15303(b).

ATTACHMENTS: Power Purchase Agreement for Renewable Biogas Fueled On-Site Power Generation by and between the City of San Diego and Linde Merchant Production, Inc., and South Bay Water Reclamation Plant Fuel Cell Site Lease.

CITY CLERK INSTRUCTIONS: Please forward two (2) copies of the Ordinance to MWW, Attn: Rose Salarda, MS 901A.

EXECUTIVE SUMMARY:

On September 17, 2007, the City of San Diego entered into the Agreement for the Purchase and Sale of Biogas with BOC Merchant Production, Inc. to sell approximately 1.3 million cubic feet per day of digester gas from the Point Loma Wastewater Treatment Plant (PLWTP). BOC Merchant Production, Inc. has since changed their name to Linde Merchant Production, Inc. (Linde). Linde is in the process of designing and building a facility on a leased site at the PLWTP to clean and compress this excess digester gas, now being flared, and load it on to compressed gas transport trucks for shipment to three 1.2MW fuel cells at host sites including the University of California, San Diego. Linde will pay MWWD approximately \$250,000 per year for this renewable fuel. This agreement for the sale of the PLWTP biogas also gave the City the rights to negotiate with Linde for one of these 1.2MW molten carbonate fuel cells.

MWWD has negotiated a Power Purchase Agreement for one of these three fuel cells to produce 1.2MW of renewable baseload electricity for, and at, its South Bay Water Reclamation Plant (SBWRP). The Linde owned 1.2MW Fuel Cell Energy brand fuel cell and compressed gas unloading station will be designed, permitted, installed, owned, operated, and financed by Linde. The compressed gas trucks will make two round trips per day from the PLWTP to the SBWRP to provide digester gas fuel to this ultra clean, 47% efficient fuel cell whose by products are biogenic carbon dioxide and water. This fuel cell will reduce green house gas emissions by over 2,500 tons per year and will add 1.2 MW of renewable energy to the City's goal to install 50MW of renewable electricity generation by 2013.

The PLWTP Agreement to sell the gas to Linde and the SBWRP's Power Purchase Agreement are completely separate agreements.

The SBWRP is expected to save approximately \$75,000/yr on electricity, that it will avoid purchasing from SDG&E, for a total expected savings of \$750,000 over the initial 10-year term of the agreement. The renewable electricity cost from Linde will be 10.6 cents/kwh with no electrical demand charges and no escalation in cost for the first 5 years of the agreement. The agreement includes the option for extensions of 1 to 10 years, if both parties agree.

Additionally, under certain circumstances, potential revenues from the sale of carbon credits or greenhouse gas credits will be shared with the City.

This project is time sensitive because it is driven by first come, first serve, California Self-Generation Program grants, as well as Federal renewable energy tax credits that are set to expire on January 1, 2009. The South Bay Fuel Cell is expected to be operational in December 2008.

Equal Opportunity Contracting Program (EOCP)

Funding Agency: City of San Diego

Goals: 15% Voluntary (MBE/WBE/DBE/DVBE/OBE)

Subcontractor Participation: Construction contractors will be selected after Linde completes the design and permitting of the installation and EOC outreach for contractors is complete. City staff will monitor achievement of goals prior to issuing a Notice to Proceed with Construction, which is a defined term in the Agreements.

Other: A Work Force Report of the San Marcos office has been submitted. The Work Force Report reflects fewer than 15 employees and is, therefore, exempt from employment category goals.

FISCAL CONSIDERATIONS:

This renewable energy fuel cell installation will be owned, financed, and operated by Linde Merchant Production, Inc. The Power Purchase Agreement is expected to save the SBWRP approximately \$75,000 per year in electrical energy costs for a total of \$750,000 over the 10-year term of the agreement. This action also includes an agreement to lease Linde the South Bay Water Reclamation Plant Fuel Cell Sites, approximately 19,450 square feet of land area, in consideration for the energy savings.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

This item was approved by Natural Resources and Culture Committee 4-0 on February 27, 2008. The Agreement for the Purchase and Sale of Biogas with BOC Merchant Production, Inc, for the sale of digester gas from the PLWTP, authorized by Council on September 4, 2007.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

This item will be reviewed by the Natural Resources and Culture Committee on February 27, 2008. This item was approved by the San Ysidro Planning and Development Group on January 15, 2008, and by the Metro Commission Technical Advisory Committee on January 16, 2008.

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable):

Rate Payers

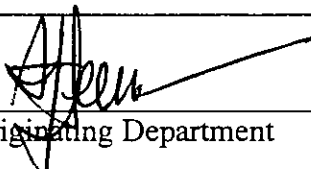
California Center for Sustainable Energy (CCSE)

Linde Merchant Production Inc.

SDG&E

Public Utilities Commission

Projected impacts: Two round trips of gas trucks per day to the SBWRP from the PLWTP, controlled energy costs, reduced power plant emissions, reduced need for additional electrical utility infrastructure.


 Originating Department


 Director of Public Utilities

SUBJECT:

LEAD HAZARD PREVENTION AND CONTROL ORDINANCE

BACKGROUND:

(continuation of box 11):

- 3) Establish a cost recovery, regulatory fee of \$31 to be added to the permit fee for specific permits identified in Report to Council No. 08-029 dated March 5, 2008, effective beginning 60 days after the effective date of the Ordinance, for lead enforcement in connection with proposed Section 54.1005, Lead Safe Work Practices Standards Required and Section 54.1006, Lead Safe Work Practice Standards and directing the City Clerk to amend the Ratebook of City Fees and Charges.
- 4) Find that the cost recovery, regulatory fee of \$31 is established for the purpose of meeting operational expenses associated with education, outreach and enforcement in connection with the Ordinance.
- 5) Receive the Lead Hazard Prevention and Control Ordinance Report and all attachments.

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE OF THE CITY OF SAN DIEGO AUTHORIZING A 20-YEAR AGREEMENT WITH LINDE MERCHANT PRODUCTION FOR THE PURCHASE OF RENEWABLE ENERGY FUEL CELL POWER FOR THE SOUTH BAY WATER RECLAMATION PLANT; AND AUTHORIZING A SITE LEASE AGREEMENT WITH LINDE MERCHANT PRODUCTION FOR USE OF LAND AT THE SOUTH BAY WATER RECLAMATION PLANT.

WHEREAS, Linde Merchant Production, Inc. [Linde], formerly BOC Merchant Production, Inc., has an agreement with the City of San Diego for Linde's purchase of excess sewage digester biogas produced at the Point Loma Wastewater Treatment Plant, to be used by Linde for fuel cell renewable electric generation projects; and

WHEREAS, the biogas agreement contains a provision allowing City the opportunity to negotiate with Linde for a fuel cell electric generator project at the South Bay Water Reclamation Plant [SBWRP]; and

WHEREAS, the City and Linde have negotiated mutually agreeable terms for such a fuel cell project at SBWRP; and

WHEREAS, the fuel cell project is structured as an electric power purchase agreement, with ownership of the generating equipment resting with Linde, and the equipment capable of producing up to 1.2 megawatts of renewable energy for sale to the City for its use at SBWRP; and

WHEREAS, the fuel cell equipment will be placed on leased SBWRP land of approximately 19,450 square feet; NOW, THEREFORE,

(O-2008-118)

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That the Mayor or his designee is authorized to execute, for and on behalf of the City, a 20-year agreement with Linde Merchant Production, Inc., under terms and conditions set forth in the Power Purchase Agreement for Renewable Biogas Fueled On-Site Power Generation on file in the office of the City Clerk as Document No. OO-_____.

Section 2. That the Mayor or his designee is further authorized to execute a site lease agreement with Linde Merchant Production, Inc. under the terms and conditions set forth in the South Bay Water Reclamation Plant Fuel Cell Site Lease, on file in the office of the City Clerk as Document No. 00-_____.

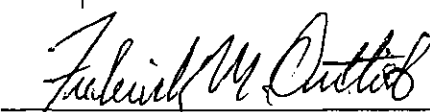
Section 3. That this activity is exempt from the California Environmental Quality Act pursuant to CEQA Guidelines sections 15060(c)(3) and 15301 because it is not a project and it consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public facilities.

Section 4. That a full reading of this ordinance is dispensed with prior to its passage, since a written copy was made available to the City Council and the public prior to the day of passage.

Section 5. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By



Frederick M. Ortlieb
Deputy City Attorney

FMO:mb
02/26/08
Aud.Cert:N/A
Or.Dept:MWWD
MWD-8071
O-2008-118

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego,
at this meeting of _____.

ELIZABETH S. MALAND, City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor